[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1906

No. [redacted] 251.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

[redacted] GOTSCHALL, AS ADMINISTRATRIX OF THE ESTATE OF MERLIN E. GOTSCHALL, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

[redacted]

[redacted]

(24,929)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 646.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

NORA GOTSCHALL, AS ADMINISTRATRIX OF THE ESTATE OF MERLIN E. GOTSCHALL, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 13, 1916.

1 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Summons.

The State of Minnesota to the above named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, a copy of which is hereto attached and herewith served upon you, and to serve a copy of your answer thereto upon the subscribers at their offices, No. 228 American National Bank Building, in the city of St. Paul, county of Ramsey, Minnesota, within twenty days from the service of this summons upon you, exclusive of the day of such service, and if you fail to answer said complaint within the time aforsaid, plain-
2 tiff will apply to the court for the relief demanded in said complaint.

Dated January 30, 1913.

W. R. DUXBURY,
C. N. CONZETT,
Attorneys for Plaintiff,

228 American National Bank Building, Saint Paul, Minnesota.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Complaint.

Plaintiff for her cause of action shows to the court:

1.

That on the 10th day of September, 1912, she was duly appointed administratrix of the estate of Merlin E. Gotschall, deceased, by the Probate Court of Hennepin county, Minnesota, and that thereafter she duly qualified as such administratrix and now is acting as such.

2.

That the defendant, the Minneapolis & St. Louis Railroad Company, now is and during all the times herein mentioned has been a corporation duly created and existing under and by virtue of the laws of the state of Minnesota, engaged in the operation of a railroad within the state of Minnesota and elsewhere and among others operates and maintains a certain line of railway in the said state of Minnesota from the city of Albert Lea to the city of Minneapolis,
in the said state of Minnesota, passing through a certain
3 station known as Jordan, in Scott county, and that the defendant is engaged in and doing an interstate business.

3.

That on the 9th day of August, 1912, and for some time prior thereto the said Merlin E. Gotschall, deceased, was in the employ of the defendant railroad company as a freight brakeman.

4.

That on the 9th day of August, 1912, said Merlin E. Gotschall was so in the employ of the defendant railroad company as such freight brakeman on one of the defendant's freight trains known as Extra 430, which was proceeding from the said city of Albert Lea to the said city of Minneapolis, along said line of railway in a northeasterly direction, and which said train was hauling interstate freight and engaged in interstate commerce. That said Extra 430 was a long, heavy train.

5

That while said Merlin E. Gotschall was so engaged in the line of his duties as such freight brakeman upon said train, and while said train was so proceeding from the said station of Jordan and when it was about two miles north thereof, by reason of the carelessness, recklessness and negligence of the defendant in failing to properly maintain their said tracks and road bed at said point and in allowing and permitting a sag or depression in the roadbed at said point,
which is at a sharp curve in the said line of railway, and by
4 reason of the careless, reckless and negligent acts of the defendant in permitting and allowing to be hauled in said train a certain box car belonging to the Chicago, Milwaukee & St. Paul Ry. Co. and known as "C. M. & St. P. 87587" when the coupling apparatus upon said car was out of repair, defective and old, and the knuckles of which were worn, making it liable to come uncoupled, and also by reason of its defective and dangerous condition in that the coupling of said C., M. & St. P. Ry. car No. 87578 was not in alignment with the coupler and coupling device attached to the car to which the said C., M. & St. P. car No. 87578 was coupled to, and by reason of the careless, negligent and defective condition of the road bed of the defendant company at said point, and by reason of the careless, negligent and defective condition of the coupler and coupling device upon the said C., M. & St. P. car No.

87578 so being hauled in said train, and by reason of the careless, negligent and high rate of speed at which said train was being so operated over said defective track, the said train came apart between the said C., M. & St. P. car No. 87578 and the car to which it was attached, which resulted in a breaking of the air upon said train and had the effect to and did cause the parts of said train to come to an immediate stop with a violent and sudden jerk while plaintiff's decedent was so engaged in his duties upon the top of said train, which resulted in throwing plaintiff's decedent from the top of said train, thereby causing him to fall upon the track
5 and between the cars in said train, resulting in his death.

6.

That the said Merlin E. Gotschall, deceased, left surviving him his father, Everett J. Gotschall, who is of the age of 42 years, and his grandmother, the plaintiff herein, Nora Gotschall, who is of the age of about 65 years, and with whom the decedent was living and to whom he was making contributions for support, for and on whose behalf this action is brought.

7.

That by reason of the facts aforesaid, plaintiff as administratrix of the estate of Merlin E. Gotschall, deceased, has been damaged in the sum of five thousand dollars ($5,000.00).

Wherefore, plaintiff demands judgment against the defendant for the sum of five thousand dollars, together with the costs and disbursements of this action.

W. R. DUXBURY,
C. N. CONZETT,
Attorneys for Plaintiff.

228 American National Bank Building, Saint Paul, Minnesota.

STATE OF MINNESOTA,
County of Ramsey, ss:

W. R. Duxbury, being first duly sworn, on his oath deposes and says that he is one of the attorneys for the plaintiff in the above entitled action; that he has read the foregoing and annexed
6 complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the reason this verification is made by affiant and not by plaintiff is because said plaintiff is now absent from the county of Ramsey wherein affiant resides and now is.

W. R. DUXBURY.

Subscribed and sworn to before me this 30th day of January, 1913.

[SEAL.] C. N. CONZETT,
Notary Public, Ramsey County, Minnesota.

My commission expires March 30, 1915.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

NORA GOTTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Plaintiff,

vs.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Answer.

The above named defendant answering the complaint of the plaintiff in the above entitled action respectfully alleges:

1. This defendant states that it has neither knowledge nor information sufficient to form a belief as to the truth of the allegation contained in subdivision one of said plaintiff's complaint, and it therefore denies the same.

2. This defendant further answering said complaint admits the allegations set forth in the second subdivision of the said plaintiff's complaint.

3. This defendant admits that on the 9th day of August, 1912, and for sometime prior thereto, one Merlin E. Gotschall was in defendant's employ as a railroad brakeman, and that on said
7 9th day of August, 1912, said Gotschall was a member of a crew in charge of one of defendant's trains known as extra No. 430, which said train was proceeding from the city of Albert Lea to the city of Minneapolis, and that said train was hauling interstate freight and engaged in interstate commerce.

4. Further answering said complaint, this defendant denies each and every allegation and fact in said complaint stated, except as hereinbefore admitted, and each and every part thereof.

5. Further answering said complaint, this defendant alleges that if the said Merlin E. Gotschall, at the time stated in said complaint, received any injuries the same were either due to unavoidable accident, or to the failure on the part of said Gotschall to exercise, for his own safety under the circumstances which then confronted him, reasonable and ordinary care, and that such failure on his part was the proximate cause of any injuries received by him.

Wherefore, defendant prays that the plaintiff's complaint be dismissed and that defendant have and recover in this action its costs and disbursements provided by law.

W. H. BREMNER,
F. M. MINER,
Defendant's Attorneys.

Service admitted February 17th, 1913.

8 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

NORA GOTTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Reply.

Now comes the plaintiff and for reply to the answer of the defendant:

1.

Denies each and every allegation of new matter in said answer contained, not hereinafter admitted, specifically denied, qualified or otherwise answered.

2.

Specifically denies that the said accident which resulted in the death of said Merlin E. Gotschall, was due to unavoidable accident, or otherwise than as set forth in the complaint herein. Specifically denies that any failure on the part of said Merlin E. Gotschall to exercise, for his own safety under the circumstances, reasonable or ordinary care, in any manner caused or tended to cause the said accident which so resulted in his death.

Wherefore, plaintiff prays judgment as in her complaint herein demanded.

C. N. CONZETT,
W. R. DUXBURY,
Attorneys for Plaintiff, 228 American National Bank Building, Saint Paul, Minnesota.

District Court, Second Judicial District.

STATE OF MINNESOTA,
County of Ramsey:

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Settled Case.

This cause came on for trial before Hon. Hascal R. Brill, J., with a jury, on the afternoon of Thursday, October 29, 1914, W.
9 R. Duxbury, C. M. Conzett and Lyle Pettijohn appearing on behalf of plaintiff, and W. H. Bremner and F. M. Miner appearing on behalf of defendant.

Jury called and sworn and case opened by Mr. Pettijohn.

Plaintiff's Exhibit A, being copy of letters of administration, issued to Nora Gotschall, Hennepin county, Minnesota, as administratrix of the estate of M. E. Gotschall, late of said county, offered and received in evidence without objection.

JOHN R. GOTSCHALL, sworn on behalf of plaintiff, testified:

By Mr. Pettijohn:

Q. Your full name is John R. Gotschall?
A. Yes, sir.
Q. Where do you live?
A. Minneapolis.
Q. What is your business?
A. Locomotive engineer.
Q. In whose employ?
A. The Minneapolis & St. Louis Railway.
Q. For how long a time have you been locomotive engineer in the employ of the Minneapolis & St. Louis?
A. I have been engineer about nine years, I believe.
Q. And where do you live?
A. In Minneapolis.
Q. You knew Merlin E. Gotschall in his lifetime, did you?
A. Yes, sir.
Q. What relation was he to you?
A. Nephew.
Q. He was your brother's son; is that right?
A. Yes, sir.
Q. Do you remember the date upon which Merlin E. Gotschall met with his death?
A. I believe it was on August 10th, somewhere around there.
Q. In what year?

Mr. Miner: It is admitted it was August 9, 1912, if the court please.

Witness: I think that is what it was—1912, about two years ago, I believe.

Q. How long had you know Merlin E. Gotschall previous to that time?
A. Ever since he was born, I suppose.
Q. And how well had you known him during this time, that is, how often had you seen him? How much did you know about his habits?
A. Well, the last couple of years he was about Minneapolis off and on all the time practically.
Q. Do you mean the last couple of years prior to his death?
A. To his death, yes.
Q. About how often did you see him during those last couple of years?

Mr. Miner: May it please the court, there is no dispute but what the young man was a young man of good character and good habits.

Mr. Pettijohn: If it is admitted in the record that his character was good and his habits were good——

11 Mr. Miner: It is not disputed. So far as we know, that is true.

Mr. Pettijohn: If you will admit that of record we won't go into it.

Mr. Miner: Yes, sir, it is admitted.

Q. Now, do you recall the date on which Merlin E. Gotschall met with the injuries which resulted in his death?

A. Yes, I know well the time that it happened.

Q. And at that time what were you employed at?

A. Engineer.

Q. For whom?

A. The Minneapolis & St. Louis Railway.

Q. And at the identical time when this accident occurred?

A. Yes, sir.

Q. You were employed as locomotive engineer?

A. Yes, sir.

Q. Where was this train upon which you were employed going?

A. Coming north.

Q. Coming north from where?

A. From Albert Lea.

Q. To where?

A. Minneapolis.

Q. When did that train leave Albert Lea?

A. I don't just remember.

Q. As nearly as you can recollect, approximately?

A. It must have been somewhere in the afternoon towards evening.

12 Q. Well, what would you say, two or seven or—approximately?

A. Well, that is pretty hard to say. Our time varies a great deal in matters of that kind.

Q. What sort of a train was this as to being passenger or freight?

A. Freight train.

Q. And what classification of freight train was it, as to being way freight or time freight or special, or what was it?

A. It was just an extra; it was what we class as an extra.

Q. Extra freight?

A. An extra freight.

Q. What was the number of that train?

A. I believe I had engine 430.

Q. Do you know the number of the train?

A. That is the way they are classified, I think as a rule, extra, according to the engine number.

Q. The extra freight trains take their number according to the number on the engine?

A. Yes.

Q. You were engineer on this train?

A. Yes, sir.

Q. Who composed the train crew upon this train, by name?

A. Well, my nephew.
Q. That is Merlin E. Gotschall, the deceased?
A. Yes, sir. A conductor by the name of Freeburg, and rear brakeman by the name of Murphy, I believe.
Q. Was there anyone else?
13 A. Myself and the fireman.
Q. What was the fireman's name?
A. Johnson, I believe.
Q. Now, where did this accident occur, if you know?
A. About two miles north of Jordan.
Q. Between Jordan and what other station?
A. Merriam.
Q. About how far is it between Jordan and Merriam?
A. It is about six miles.
Q. It is about six miles?
A. Yes, and a fraction.
Q. Do you know what time you left Jordan, approximately?
A. Somewhere around midnight or a little bit after, I think; a little after midnight, I believe.
Q. Did you stop at Jordan?
A. Yes, sir.
Q. And what was done, if anything, at Jordan, in the way of switching or train maneuvers?
A. There was nothing at all.
Q. Nothing at all?
A. No, sir.
Q. When last before the accident did you see Merlin E. Gotschall?
A. In Jordan.
Q. And where was he in Jordan when you saw him?
A. He was on my engine.
Q. He was on your engine?
A. Yes, sir.
14 Q. And the last you saw of him, I take it, then, was while he was on the engine?
A. Yes, sir.
Q. When he left the engine, in what direction did he go?
A. Went back along the train.
Q. Do you know how far back along the train he went?
A. Not exactly, no.
Q. Did you, after he left the engine, see him again prior to the accident?
A. No, sir.
Q. Before you left Jordan did you receive any signals?
A. Yes, sir.
Q. And from whence did you receive those signals?
A. From the rear of the train along the side.
Q. And what sort of signals were those?
A. A high sign to go.
Q. What is that high sign to go?
A. Well, they call them high balls, with a lamp in the dark.
Q. They swing that lantern up and down again, is that it?

A. Yes, sir.

Q. And you got that signal from the side of the train and the rear of the train?

A. Yes, sir.

Q. Where was the conductor at the time you got this signal, if you know?

A. He was, I think, at the engine or about there. He got on the engine before I left there, at any rate.

Q. This was in the neighborhood of the station at Jordan, was it?

A. Yes, sir, right at the station.

Q. Did you get those signals from one or two?

A. From two.

Q. One was at the rear of the train and the other was somewhere up along——

A. The side.

Q. Towards the middle of the train?

A. Yes, sir.

Q. After receiving those signals, what did you do?

A. I started to go, pulled out, left town.

Q. You started to pull out of Jordan; is that it?

A. Yes, sir.

Q. Headed for Merriam?

A. Yes, sir.

Q. And after you left Jordan did you see anything to the rear of the engine at any time?

A. Yes, sir.

Q. What did you see?

A. After I got the train going I looked back to see that they were all coming, and I received another high sign——

The Court: Speak louder.

Witness: After I started to go I received another high sign and got an answer to my signal or whistle—off signal to see that everything was all right, and I got an answer to that, a high sign.

Q. What is your whistle-off signal?

A. Two short whistles.

Q. You blew that just after you started, did you?

A. Yes, before I started; and then again after I got the train going.

Q. And then you got kind of an O. K. signal, did you, from the back end?

A. Yes.

Q. Now, you say you got another signal. Where did you get that other signal from?

A. Well, from both of them, the hind end and the other man was on top.

Q. You got one from the hind end, the man on the hind end, where was he as to being on top of the train or on the ground?

A. He was on the way-car, I presume.

Q. And by the way-car you mean the caboose?

A. The caboose, yes, sir.
Q. And what part of the way-car do you figure he was on?
A. On the platform.
Q. And how do you judge—by the heighth of the signal?
A. Yes.
Q. That is, it was low down, so it appeared he was giving the signal from the steps, is that it?
A. Yes.
Q. And the other one came from the top of the train?
A. Yes, sir.
Q. Which one was ahead of the other one?
A. The one on top.
17 Q. The higher one was nearer to you?
A. Yes, sir.
Q. And you got that signal from both of them?
A. Yes, sir.
Q. You pulled out of Jordan?
A. Yes, sir.
Q. How many cars did you have in that train, if you know?
A. I don't remember now. We had quite a long train.
Q. Well, approximately.
A. Forty or fifty cars, something like that.
Q. The ordinary extra freight train?
A. Yes.
Q. Now, what was the next thing that you remember out of the ordinary?
A. Well, we ran along for a couple of miles and the train broke in two. Of course, that stopped us at once.
Q. Well now, you say the train broke in two. By that what do you mean?
A. Well, it came apart, the knuckles, the draft rigging parted and left the train apart and set the air and stopped them at once.
Q. What was the first notice that you had that the train had broken in two?
A. When the air set on my engine very rigid.
Q. And at that time you were seated, I take it, in the engineer's cab?
A. Yes, sir.
Q. You noticed a rigid setting of the air?
A. Yes, sir.
18 Q. And then what happened?
A. It came to a stop.
Q. The train came to a stop?
A. Yes, sir.
Q. Did you apply the brakes in any way?
A. No, sir.
Q. Did you do anything to accelerate or to aid in bringing that train to a stop?
A. Well, I lapped my valve, yes.
Q. You what?
A. I lapped the brake-valve to keep the air from escaping.

Q. I don't know what that means. Tell us what that means.

A. Well, when the train parts, of course, the hose—the air-line is broken in two and lets the air all blow away to the atmosphere. I just brought my brake-valve on lap, and blanked that to keep it from blowing out, that is all, blowing away; that is all I could do. There was nothing more that you could do.

Q. You shut off the pressure?

A. Yes, sir.

Q. You didn't do anything else to bring it to a stop?

A. No, sir.

Q. How fast were you running at the time that this break occurred?

A. Oh, 20 to 25 miles an hour, I should judge.

Q. And how far did you run after that break?

A. Oh, about eight or ten car lengths, I should judge.

19 Q. Then you came to a complete stop, did you?

A. Yes, sir.

Q. How about the back end? Do you know how far that ran before it came to a stop, that is, the end behind where the break occurred?

A. Just about the same distance, a little bit shorter, probably, than what the head end went.

Q. Is there any reason that you, as an engineer, know of why the back end will not run as far as the front end under such circumstances?

A. Why, it is practically about the same.

Q. I believe you testified upon the former trial something with reference to the pump on the engine counteracting the effects of the brake; is there anything in that?

A. Yes, if you would release your valve, if you put your valve in a release position, why, it might—your train might drift along, the head proportion quite a little farther than the rear proportion before it came to a stop.

Q. Now, when this train came to a stop, what did you do?

A. Well, the conductor was on the engine and he at once went back to see where the trouble was.

Q. The conductor at this time was on the engine?

A. Yes, sir.

Q. You and the fireman, I take it, were also on the engine?

A. Yes, sir.

Q. While you are in motion on one of these extra freight trains, what is the proper position for a head brakeman, where does

20 he belong while the train is in motion?

A. He usually rides on the firemen's seat-box.

Q. Is that the general custom on the Minneapolis & St. Louis Railway?

A. Yes, sir.

The Court: I did not understand what the answer was.

Q. Is it the usual custom on the Minneapolis & St. Louis Rail-

way for the head brakeman to ride on the fireman's seat-box while the train is in motion?

Objected to as immaterial.
Objection overruled.

A. Yes, sir, it is.
Q. From your experience, while in the employ of the Minneapolis & St. Louis Railroad Company, is it customary for the head brakeman to come over the top of the train after leaving a station?
A. Yes, sir.
Q. Where, as a general rule, does the head brakeman board the train when you pull out of a station?
A. Wherever he might be at the time you start to go.
Q. After boarding the train, then what does he do?
A. He comes over to the engine.
Q. And by coming over to the engine, you mean what?
A. Well, he would have to come over the top of the cars after the train is in motion.
Q. Comes over the top of the cars to the engine?
21 A. Yes, sir.
Q. And he will remain on the engine then how long?
A. Until they make the next stop or it is necessary to obtain signals for some other reasons or cause, whatever his duty might be.
Q. Where does the conductor ordinarily ride while the train is in motion?
A. In the caboose.
Q. So that, as you have testified in this case, the conductor was riding on the engine at this time?
A. Yes, sir.
Q. That was extraordinary, was it?

Objected to as immaterial.
Objection sustained.

Q. I believe you stated that the conductor was riding upon the engine?
A. Yes, sir.
Q. Now, at the point where this train pulled apart, what sort of a track was there, as to being straight or curves in it?
A. Well, it was just around a curve; there is curves there in the track. It isn't a straight track by any means. There is a reverse curve, I think, just prior to where it happened.
Q. By reverse curve I take it that you mean a letter "S"?
A. Yes, sir.
Q. So that you had completed that letter "S" and just about got on the straight track, had you?
A. Yes, sir.
22 Q. Do you think the whole train had got on the straight track?
A. No, sir.
Q. Or only a part of it?
A. Just a part of it.

Q. About how much of it do you think you had got on the straight track at that time?

A. Oh, fifteen to twenty cars, I presume.

Q. Fifteen or twenty cars?

A. Yes.

Q. Now, going at the rate of twenty to twenty-five miles an hour, if the air connection is suddenly broken, as you said it was in this case, what is the effect on that train as to bringing it to a stop?

A. It stops very sudden.

Q. And by very sudden, that is a relative term; does it stop—do you mean with a jerk or how does it stop? Give us a little more detail.

A. Yes, it does; the hardest stop that possibly can be made with a train. When the hose parts there, that is the biggest part of the train line, and of course that is the hardest stop that you can make with a train by parting the hose, the air.

Q. Is that what might be termed an emergency stop?

A. Yes, sir.

Q. And if you were to stop the train as engineer could you bring it to a stop any more quickly than by breaking that air connection?

A. No, sir.

Q. I take it, then, that that is the most violent stop that can be made?

23 A. Yes, sir.

Mr. Miner: He has already said so.

Q. Now, after this train came to a stop, did you leave the engine?

A. Yes, sir.

Q. Immediately after?

A. No, sir.

Q. How long after?

A. In the course of a few minutes, I expect. I don't know exactly.

Q. I take it you and the fireman and conductor were on the engine. Who left first?

A. The conductor.

Q. Do you know which side he went down on?

A. Yes.

Q. Which side?

A. He got down on the right side.

Q. That is on your side?

A. Yes.

Q. As engineer you are on the right side?

A. Yes, sir.

Q. As you came out of this curve, which way was the curve, as to the right side? Was it convex or concave?

A. It would be to the left, the curve would have been to the left.

Q. Seated upon the engine looking back, could you see the end of the train?

A. No, sir.

Q. It was away from you?

A. Yes, sir.

Q. It was around on the fireman's side?

24 A. Yes, sir.

Q. On the left hand curve?

A. Yes, sir.

Q. How long after the conductor left the engine did you leave the engine?

A. Oh, in a very few minutes, possibly three or four or five minutes, something of that kind.

Q. What was the occasion of your leaving the engine?

A. I helped the conductor carry a chain back to chain up a car.

Q. Did the conductor come back to the engine after having left it?

A. Yes, sir.

Q. And what if anything did he say at that time?

A. There was a drawbar pulled out of the car.

Q. Did he tell you whereabouts on the train that was pulled out?

A. Yes, sir.

Q. And where did he say it was pulled out?

A. Some eight or ten cars back of the engine, something like that; I couldn't just say exactly.

Q. And previous to the time of the conductor's coming back, had this train made any movements?

A. No, sir.

Q. And you know what a drawbar is?

A. Yes, sir.

Q. What is a drawbar?

A. It is a draft rigging under a car made to couple them together with and haul your interstate traffic.

25 Q. It is a part of the appliance by which they are coupled together, isn't it?

A. Yes, sir.

Q. And when a drawbar is pulled out, they can't be coupled; isn't that right?

A. Yes, sir; that is right.

Q. And he told you that a drawbar was pulled out and you went back and helped him chain it up?

A. Yes, sir.

Q. And you chained it up for what purpose?

A. Hauling it to where we could set it out, get rid of it.

Q. Now, at the point where this drawbar had pulled out, is that where the train broke in two, as you have told us?

A. Yes, sir.

Q. That is where the train broke in two?

A. Yes, sir.

Q. And that was about eight or ten cars back from the engine?

A. Yes, sir.

Q. Did you go back and help him chain it up?

A. Yes, sir.

Q. What did you find when you got there?

A. I found the drawbar was pulled out, that was all; it was

pulled out. We had to chain the car up so we could haul it to a siding and set it out before we could couple on to our train again.

Q. When a drawbar is pulled out, isn't it possible to put it back in again?

A. Not on the road in a case of that kind, no, it isn't.

26 Q. What have you got to do when a drawbar pulls out?

A. Have to chain the car up, as a rule, with a chain used for that purpose.

Q. Do you mean to chain it to the next car ahead?

A. Yes, sir.

Q. Anything broken on that car?

A. Not that I know of outside of the drawbar being pulled out.

Q. Well, now, when a drawbar pulls out, does that pull out any staples or screws or bolts or anything of that kind, or what does it do?

A. It generally does, yes.

Q. Well, in this case did it?

A. I presume the bolts were all broken in the draft rigging.

Q. Did you pay any particular attention, did you notice?

A. No, I didn't. I know the drawbar was out and I couldn't couple on to it; it was necessary to chain the car up.

Q. Can the drawbar come out?

A. Yes.

Q. Without pulling loose the bolts or screws or staples, or something of that sort?

Objected to as immaterial.

The Court I think I will allow it.

A. No, it can't; there would have to something come loose to let it out. If there wasn't something broken or loose, why it wouldn't come out, that is sure.

27 Q. Something has either got to give way or break before it could come out, hasn't it?

A. Yes.

Q. And when a drawbar pulls out in that way, what is the effect on the coupler, if any?

A. Well, they part. There is nothing to hold them together. If the drawbar is pulled out, why it is gone, that is all.

Q. And if the coupler parts, what is the effect on the air connection?

A. It will break the air connection, of course.

Q. There is nothing left, I take it, after the coupler parts excepting this rubber hose?

A. That is all.

Q. And it will break that?

A. Yes.

Q. When that breaks, what happens?

A. It sets it to its greatest capacity—emergency.

Q. Sets an emergency brake on that train?

A. Yes, sir.

Q. How about the end that the engine is attached to and the caboose—set it on both ends or only one?
A. Both ends.
Q. Which one does it set the hardest on?
A. Practically the same.
Q. After chaining up this car, what did you do next?
A. We went to Merriam with it and set it out.
Q. How far was that about?
A. Oh, about three and a half to four miles?
Q. And then what did you do?
28 A. We came back after the rest of our train.
Q. Now, you say "we", who do you mean by "we"?
A. Well, the conductor and fireman and myself was all.
Q. The three of you took the train up to Merriam and came back?
A. Yes, sir.
Q. That is, when you came back how much of the train did you bring back with you?
A. All except the one car that we set out.
Q. You just set the one car out?
A. Yes, sir.
Q. During the time that you were there chaining up this other car, did you make any search, or did any of them make any search for the head brakeman?
A. No, sir.
Q. Anything said as to his whereabouts?
A. Yes, sir.
Q. Who made the statements, and what were they?
A. Well, we all talked, I guess, the conductor and I did, wondering why he wasn't there, why he hadn't got there.
Q. But nobody went looking for him?
A. No, sir.
Q. About how long did it take you to run this car into Merriam and back there to the scene of the accident?
A. About half an hour.
Q. And when you came back, then what did you
29 do?
A. We went to look for the brakeman.
Q. Did you find him?
A. Yes, sir.
Q. Well, where did you look? Tell us what you did when you started. Who went to look for him first? Tell us?
A. The conductor and myself.
Q. The conductor and yourself went to look for him?
A. Yes, sir.
Q. You were on the engine, I take it, when you started out to look for him?
A. Yes, sir.
Q. And which side of the train did you go down on?
A. I went down on the right side of the train.
Q. That is, on the inside of the curve?
A. On the outside.

Q. On the outside of the curve?
A. Yes, sir.
Q. And how far down on that side did you go?
A. I went clear to the rear of the train.
Q. Did you find him?
A. No, sir.
Q. Then what did you do?
A. The conductor stayed there at the car and I went back on the other side.
Q. That is, on the outside of the curve?
A. Yes, sir. About halfway back in the train I found him.
Q. How did you find him?
30 A. Lying on the ground, face downward. He was cut in two.
Q. Cut in two?
A. Yes, sir.
Q. That is, where was his body with reference to the tracks?
A. Part was on the inside of the track and part on the outside.
Q. And which part was on the inside and which on the outside?
A. The limbs were on the inside and the trunk was on the outside.
Q. Was there anything else in the neighborhood there in the way of lanterns or tools or anything?
A. The lantern and his cap was right at his hand.
Q. They were right at his hand?
A. Yes.
Q. How far back from the place of the original break was it that you found this body at that time?
A. About eight to ten cars.
Q. About how long after the original break would you say it was, assuming that it took half an hour to go to Merriam and back?
A. Forty to forty-five minutes.
Q. During all that time had any search been made by either you or the conductor or any of the other train men, to your knowledge, to ascertain the whereabouts of this head brakeman?
A. No, sir.
Q. About how many car lengths from the split in the train was this body?
31 A. Eight to ten cars.
Q. That is, eight to ten cars back from the forward car of the rear section with the break; is that what you mean?
A. Yes, sir.
Q. And between the two section after the break, how much of a distance was there?
A. About a car length.
Q. About a car length?
A. Yes, sir.
Q. What was the last signal before this accident that you received from the rear end of that train?
A. A high sign.

Q. From where did you get this high sign?
A. From the rear of the train and from on top of the train, repeated.
Q. From on top of the train repeated, or both of them repeated?
A. One from the other repeated.
Q. You mean by that the signal came from the rear end——
A. First, yes, sir.
Q. —to the middle of the train——
A. Yes.
Q. —or on top, and that he gave it to you?
A. Yes, sir.
Q. How far were you at that time with reference to the stations of Jordan and Merriam?
A. Just leaving the station.
Q. Which one?
A. Jordan.

Q. Did you after that receive any signals from the rear
32 end of the train?

A. No, sir.
Q. Did you see anything on the rear end of the train from that time on?
A. No, sir.
Q. Was the pump on your engine working at that time?
A. Yes, sir.
Q. Would the pump in any way tend to counteract the effect of the air-brakes on the front section?
A. Yes, sir.
Q. To what extent?
A. It is for that purpose, to pump the brakes off.
Q. So that while the brakes were automatically attempting to set themselves, the pump was trying to keep them off?
A. It would under conditions.
Q. Under the conditions that existed at that time would it?
A. No, sir.
Q. Why not?
A. Because I lapped my valve and blanked the ports.
Q. What was the first notice you had that there was anything the matter with that train that night?
A. Well, when the air set on the engine.
Q. How did you know that the air was set?
A. Anybody that ever worked on an engine or a train would know at an instant when the brakes were set, just the same as though you grab something on your chair and pull it.

33 Q. I never have, and the jury never have. What was the sensation; do you feel it?

A. Feel it, yes. The brake on the engine took right ahold of the brake-shoes, and the wheels grind and take right hold and bring it right up to a stop.
Q. About how far did you say that the engine ran after the brakes were set that way?
A. Eight to ten cars.

Q. What was done with that body after you found it?
A. It was loaded into the caboose and brought over to Merriam and left there.
Q. Who loaded it into the caboose?
A. The conductor with the assistance of the hind brakeman, I believe, helped.
Q. Were you present at the time?
A. No, I wasn't.
Q. You didn't take any part in loading it on to the caboose?
A. No, sir.
Q. Nor in unloading it at Merriam?
A. No, sir.
Q. Was this body completely severed at the time you found it there?
A. Yes, sir.
Q. Completely severed?
A. Yes, sir.
Q. Just across what part of the body was the severance made?
A. It was right across the abdomen.
Q. In the small of the back, I take it, too?
A. Yes, sir.
34 Q. Lying face downward?
A. Yes, sir.

Cross-examination.

By Mr. Miner:

Q. You testified in this case before, Mr. Gotschall?
A. Yes, sir.
Q. You testified at that time that this train was composed of about fifty freight cars?
A. Yes, sir.
Q. And that the train parted about in the middle?
A. I think so.
Q. About twenty-five cars back from the engine?
A. Yes, sir.
Q. Now, the track where you stopped at Jordan was a straight track?
A. Yes, sir.
Q. And how far north of Jordan did this reverse curve that you have spoken of begin?
A. It starts in about a mile and a half, I think.
Q. About a mile and a half north of the station at Jordan?
A. Yes, sir.
Q. And how long is this reverse curve?
A. Oh, it is half a mile.
Q. Half a mile in length?
A. Yes, sir; anyway that.
Q. So that the north end of the reverse curve would be about two miles north of the Jordan station?

35 A. Yes, sir.

Q. Now, when you stopped at Jordan, was your train stopping north or south of the station?

A. Right at the station.

Q. How much of the train projected north of the station when you stopped at Jordan?

A. Not any.

Q. Not any?

A. Not any.

Q. Then the entire train was south of the station, do I understand?

A. Right at the station.

Q. Right at the station?

A. Yes, sir; the water tank—the engine was spotted at the water tank.

Q. And is the water tank north or south of the station?

A. North.

Q. How far north?

A. Well, just at the end of the platform.

Q. Well, does the platform extend out beyond the station building itself?

A. Yes.

Q. How far?

A. Sixty feet or 100, something like that.

Q. So that your engine was that distance north of the station?

A. Yes, sir.

Q. And your train was standing still?

A. Yes, sir.

Q. And you got these signals to proceed?

A. Yes, sir.

36 Q. And you started north?

A. Yes, sir.

Q. Now, fifty freight cars and a caboose and a locomotive would extend about what length—the entire train?

A. About 2,000 feet.

Q. A little better than a third of a mile?

A. Yes, sir.

Q. Was the grade from Jordan north level or up and down?

A. It is a little up and down, rolling.

Q. Rolling?

A. Yes.

Q. You think you started that freight train of fifty cars—were those cars loaded or empty?

A. I think they were both loads and empties, if I am not mistaken. I don't just remember what they were. I think they were loads and empties, both, mixed, probably. They generally are in a train of that sort.

Q. One engine or two?

A. One engine.

Q. Do you think you started that train of fifty cars and caboose from a standing position at the Jordan station and attained a speed

of from twenty-five to thirty miles an hour before you had proceeded two miles north of the station?

A. Yes, sir.

Q. And around a reverse curve?

A. Yes, sir.

Q. And in order for you to do that the track would have to be in good condition, wouldn't it?

37 A. Yes, sir.

Q. Because if it weren't, you wouldn't take a train of that magnitude up to that rate of speed in that distance, would you?

A. Ordinarily——

Q. Twenty-five miles an hour?

Objected to as immaterial.

Overruled.

No answer.

Q. Now, you think the front of your train, as I understand it, about ten or fifteen cars had passed off from the reverse curve on to the straight track?

A. Yes, sir.

Q. At the time that the separation occurred?

A. Yes, sir.

Q. And the separation occurred about twenty-five car lengths back from the engine?

A. Yes, sir.

Q. Those freight cars are approximately what length?

A. Thirty-six, thirty-eight.

Q. The conductor at the time was in the locomotive cab?

A. Yes, sir.

Q. And he immediately got down and went back to see what the trouble was?

A. Yes, sir.

Q. You knew that the train had separated?

A. Yes, sir.

Q. After he got back there a certain distance, you got a signal to back up, didn't you?

A. No, not at that time.

38 Q. Didn't you testify in the former trial that the conductor went back and found a coupler-pin and that he signaled you to back up and couple up again?

A. Not until after we had set our bad-order out. He did afterwards, yes, after we first disposed of our bad-order car.

Q. Did you testify in the last trial anything about setting out a bad-order car before coupling up where this separation occurred in the train?

A. I don't just remember what the testimony was on it. I know that we had to set the bad-order car out before we could make any couplings beyond it. We didn't have anything to couple with.

Q. Let me ask you: On the former trial was this question asked you and did you make the following answer, "Q. And then what was done? A. Backed up and coupled on to the rear portion of the

train, then he gave me a sign to slack ahead a little to see whether they were together proper or not. And when we done so, we found out that there was a drawbar pulled out farther ahead between where they parted and the engine. Of course they pulled the hose apart again and the air was gone." Did you so testify on the first trial of this law suit?

A. I must have if it is there.

Q. Well, was that correct?

A. Very likely so.

Q. You don't claim that you have a better, clearer recollection of these circumstances now than you had when you first testified, do you?

A. No. I don't. I don't remember all those conditions.

39 I don't remember that long.

Q. Then you found that the drawbar had pulled out after you slackened ahead about ten or fifteen cars back of your engine, and that broke your airhose again, didn't it?

A. Yes, sir.

Q. Then the conductor came ahead and got you to help him carry a chain back for the purpose of chaining up the car, didn't he?

A. Yes, sir; I helped carry the chain back.

Q. And after you had chained that car to the cars between it and the engine, then you went up to Merriam Junction and set that car out?

A. Yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

Q. And then you came back and coupled the part of the train that you took to Merriam Junction with you on to the remaining part of the train?

A. Yes, sir.

Q. And then you left your position and went back to the rear of the train, as you have told?

A. Yes, sir.

Q. And found the remains of the young man?

A. Yes, sir; you are right.

Q. Now, in order that the jury may understand your statement as to where you found him; did you find him eight or ten cars to the rear of the back part of the train which had first separated from the front part or eight or ten cars back from where the draw-bar was pulled out?

A. It was back from where the train first separated.

40 Q. In the center of the train?

A. Yes, sir.

Q. Now, in that train of fifty cars, there were a number of gondola cars, were there not?

A. I couldn't say; I don't remember.

Q. Well, you went along the side of the train?

A. I don't remember whether there was gondolas in the train or not, I couldn't say.

Q. Didn't you testify on the former trial that there were a number of gondola coal cars scattered along in that train?

A. I couldn't say.

Q. I am quite sure you did, and yet I wouldn't say that you did.

Mr. Pettijohn: He didn't; the conductor did.

Q. In going back to the rear of the train on the right hand side and then coming back on the left hand side, you didn't notice whether there were any gondola cars in the train or not?

A. No, I couldn't say now, I don't remember.

Q. A gondola car is a car with low sides and open at the top in which coal is carried, is it not?

A. Yes, sir.

Q. And about one-third as high as an ordinary freight car?

A. Yes, sir.

Q. It hasn't any covering over the top?

A. Yes, sir.

Q. You say that in this case you think that the two parts of the train, after the train separated, ran about the same distance
41 before they came to a stop?

A. Yes, sir.

Q. Of course you know your air-hose had broken when the shoes set on the drivers and the train began to stop?

A. Yes, sir.

Q. Eight or ten car lengths, that would be eight or ten times 36 or 38 feet, according to the length of the cars?

A. Yes, sir.

Q. So that if the two parts ran ten car lengths after the separation came, then they would run about 360 feet?

Objected to as being a mathematical calculation which the jury can figure as well as the witness.

Q. So that the distance which the train ran after the air-hose broke and the time when it came to a stop was somewhere about 350 feet, Mr. Gotschall?

A. Yes, sir.

Q. Before it came to a complete stop?

A. Yes, sir.

The Court: Let me understand: Do you mean the entire train or the——

Mr. Miner: Each section of the train, your Honor, about 350 feet after the air-hose broke before each section came to a dead stop.

The Court: As I understand it, that one section was eight or ten car lengths ahead of the other.

Mr. Pettijohn: There is no evidence to that effect.

Mr. Miner: He said in his opinion they were separated
42 about a car length.

Q. At whichever point the train separated, Mr. Gotschall, that would at once set the air, would it not?

A. Yes, sir.

Q. Because it would break the air-line?

A. Yes, sir.

Q. So that if this drawbar pulled out first, that would immediately stop a train, would it not?
A. Yes, sir.
Q. Whichever point first separated?
A. Yes, sir.

The Court: I don't know that I quite understand. Something was said about eight or ten car lengths. He testifies that the train ran about eight or ten car lengths after the hose broke after the cars separated?
Mr. Miner: Yes, sir.
The Court: And that the two sections were about a car length apart?
Mr. Miner: When they stopped, yes.

Court here adjourned until Friday morning, Oct. 30, at 10 o'clock, at which time court convened.

Redirect examination.

By Mr. Pettijohn:

Q. Mr. Gotschall, for how long a time had Merlin Gotschall been working on the same run with you before the day of the accident?
A. Well, there was nothing regular about it. The day before on that trip was all.
Q. Well, I mean on former trips had he been with you at all?
43 A. Yes, some three or four trips, I think.
Q. Where did you last see him, yourself?
A. He was on the engine at Jordan the last time I see him.
Q. That is, when you pulled in to Jordan, he was on the engine?
A. Yes, sir.
Q. And had he been with the train all of the time since they left Albert Lea?
A. Yes, sir.
Q. Now, as to the condition of the track as to being level or not; what do you know about that?
A. A little rolling, up and down. It isn't exactly level.
Q. That is, at the point where that pulling apart occurred, it is a little rolling, or is it all along there?
A. Well, it is a little up and down; it ain't what you could say exactly level or anything like that.
Q. Do you know what Merlin's wages were at the time that he was killed?
A. No, sir; I do not.
Q. Do you know what the ordinary wages of a head brakeman in the employ of the Minneapolis & St. Louis at that time were?

Objected to as immaterial.
Mr. Miner: I think he was on the extra force. Whatever the salary was, there will be no dispute about it. We will ascertain that fact and admit it.

By Mr. Miner:

Q. Mr. Gotschall, when you were speaking about this track, I suppose what you mean is that the road at that particular
44 place was built along in sort of a rolling country?
A. Yes, sir.
Q. That is all?
A. Yes, sir.
Q. You didn't mean to say there was anything wrong with the track?
A. No.

By Mr. Pettijohn:

Q. When you found the body of Merlin there, as you have described finding it, he was dead at that time, was he?
A. Yes, sir.
Q. And you said he had his lantern in his hand. In what condition was the lantern? I mean as to being lighted or unlighted or broken or anything of that kind.
A. I ain't just exactly certain about it. I think the globe was broken on the lantern. The lantern lay close to him to his side as though he let loose of it when he fell like.
Mr. Miner: Wait a moment; you are simply giving your impression now, are you not? You don't know that he let loose of it?
Witness: No.
Q. About how long after you pulled out of Jordan, in minutes, would you say it was when the train pulled apart?
A. Oh, about five to seven minutes.

WILLIAM A. FREEBURG, sworn on behalf of p-aintiff, testified:

By Mr. Pettijohn:

45 Q. Where do you live, Mr. Freeburg?
A. Minneapolis.
Q. What is your occupation?
A. Conductor.
Q. And you are conductor for whom?
A. Freight conductor for the Minneapolis & St. Louis railroad.
Q. That is your occupation at the present time; and for how long a time have you been such?
A. Four years.
Q. Were you freight conductor with the Minneapolis & St. Louis at the time that Merlin E. Gotschall met with his death?
A. Yes, sir.
Q. In the accident between Jordan and Merriam?
A. Yes, sir.
Q. Were you the conductor in charge of the train?
A. Yes, sir.
Q. What was the route of the train that day? Where did it start and where was it bound for?
A. Why, it started from Albert Lea and was bound for Minneapolis.

Q. And what was Gotschall's capacity upon that train?
A. He was a head brakeman.
Q. And who else was on the train composing the train crew?
A. A fellow by the name of Mike Murphy for rear brakeman and I was the conductor and he was the head brakeman.

46 Q. And J. R. Gotschall who just testified was engineer?
A. Yes, sir.

Q. And the fireman's name was what?
A. William Johnson.
Q. You saw the body of Gotschall after the accident?
A. Yes, sir.
Q. When was the last time you saw Gotschall?
A. The last time I seen Gotschall to talk to him was at Montgomery.
Q. And with reference to Jordan where is Montgomery?
A. Montgomery is seventeen miles south of Jordan.
Q. That is, it is beyond Jordan from Minneapolis?
A. Yes, sir.
Q. How many stations are there between Montgomery and Jordan?
A. Two,—Helena and New Prague.
Q. Did you make a stop at Helena or New Prague?
A. No, sir.
Q. You didn't make any stop between Montgomery and Jordan, then?
A. No, sir.
Q. What sort of a stop did you make at Montgomery?
A. We stopped there to take coal and water, and I think we rested a car.

47 Q. Where on the train or about the train did you see Gotschall at the station of Montgomery?
A. He was helping me out.

Q. Was he up at the head end or back end, or whereabouts on the train?
A. Well, he came around to the engine to put some water on a hot-box.
Q. And the two of you were there together?
A. Yes, sir.
Q. From Montgomery to Jordan whereabouts did you ride on the train?
A. I rode on the rear end.
Q. That is, in the caboose?
A. Yes, sir.
Q. Where did Gotschall ride?
A. He was on the engine.
Q. You didn't see Gotschall at all at the station of Jordan?
A. No, I seen his light, it was dark, but I didn't see him to talk to him.

Mr. Miner: Wait a moment. Are you testifying to a fact or simply expressing an opinion?

Witness: Well, I suppose it was him. The other man was on the hind end.

Q. Tell us what you did see there.

A. Well, we arrived at Jordan and we took water at Jordan, and I walked from the rear end up to the engine, looking over the train, and the rear man he was on the opposite side of the train.

Q. That is, Murphy?

A. Murphy walking down until he met Gotschall and when I got to the engine why we was all ready to go, so we gets a high ball from the rear end of the train.

48 Q. What was this high ball?

A. A signal to go ahead.

Q. And that signal was given with what?

A. A lamp.

Q. More than one or just one?

A. Well, just one, I guess.

Q. One was all you saw? That was back somewhere on the rear of the train?

A. Yes, sir.

Q. Then you pulled out of Jordan?

A. Yes, sir.

Q. And after you pulled out of Jordan, what part of the train were you riding on?

A. I was riding on the engine.

Q. In pulling out of Jordan as you did that night, what were Gotschall's duties as head brakeman?

A. Why, his duties was to get over towards the head end of the train.

Q. And how would he do that?

A. Well, he would have to walk over the top if he wasn't on the engine when he started out of town.

Q. Where does the head brakeman belong when the train is in motion?

A. He belongs on top near the head end or—no, he belongs on the engine.

Q. He belongs on the engine?

A. Yes, sir.

Q. In order to get there, when the train pulls out, he would have to climb up and come over the top, is that it?

49 A. Yes, sir.

Q. About what time was it that you pulled out of Jordan?

A. I don't know; it was near midnight some time. We pulled out of Jordan after taking water, and about two miles north of Jordan, why the train broke in two, and I goes back to see what was the matter, and I finds——

The Court: Speak louder.

Witness: I walks back and finds the train broke in two about twenty-five car lengths back, more or less, I don't know exactly, but I see that a drawbar is pulled out of the wrong end of the car, so I goes to work and—no, this was a different—it breaks in two and

I couples the train up, and then I gives a sign to go ahead and I pulls a drawbar out.

Q. Let us get a little more in detail. What was the first you knew of the train having broken in two? How was it called to your attention, in the first place?

A. Well, it come to a stop two miles north of Jordan.

Q. And what sort of a stop was that? How was your attention called to it?

A. Well, the air went into emergency and we come to a sudden stop.

Q. You were sitting on the engine; how did you know that the air went into emergency?

A. Why, you could tell that by the air gauge on the engine, the air was all gone.

50 Q. Could you tell it any other way?

A. No.

Q. I mean could you tell by the kind of a stop you were making whether the air went into emergency or not?

A. We wasn't making no stop, we was running at full speed.

Q. When it did come to a stop could you tell by the kind of a stop you were making, that the air was in emergency?

A. Yes, sir.

Q. Those emergency stops, I take it, are sudden stops?

A. Yes, sir.

Q. Can you make any more sudden stop than when the air goes into emergency that way?

A. No, sir.

Q. About how big a train did you have that night?

A. Had forty-five or fifty cars.

Q. Loads or empties?

A. Both.

Q. About how far back did this first break occur?

A. About in the middle of the train.

Q. And you went back after the train came to a stop to find out what was the matter?

A. Yes, sir.

Q. What did you find when you got back there?

A. I found the train had broken in two, just a coupling had—a drawbar had uncoupled, the coupler was uncoupled.

51 Q. On what portion of the train was the knuckle or drawbar open?

A. It was on the south end of the car that was on to the head end of the train.

Q. Then it was the knuckle which was attached to the portion which went with the engine that was open?

A. Yes, sir.

Q. What kind of a car was that that this coupler was open on—on what road?

A. I don't remember.

Q. Well, if you stated on the former trial that it was a Milwaukee car, would you say that was correct?

A. Yes, sir.
Q. What was this—a box car or a flat car or gondola?
A. Box car.
Q. And the one, the front car on the rear section, what was that?
A. That was a box car.
Q. That was also a box car. Did you have anything in that train excepting box cars that night?
A. Yes, sir
Q. What were they?
A. Gondolas.
Q. About how many of them did you have, do you know?
A. I don't know.
Q. Do you know where they were situated in the train?
A. No, sir.
52 Q. With reference to where the break occurred?
A. I don't remember.
Q. When you found this coupler open, what did you do?
A. I coupled on to the train and tied in—I coupled up the air.
Q. I mean right away what did you do? Did you go in and look at the coupler, make an inspection of it?
A. Well, they was both brand new couplers and I couldn't tell what caused them to part, so I couples up the train to see if the coupling was all right.
Q. Did you go in between the cars to look at this coupler that was open?
A. Yes, sir.
Q. What sort of a knuckle was that?
A. I think it was a major knuckle.
Q. How do those major knuckles operate?
A. There is two classes of major knuckles: one operates with a pin-lifter that you pull up, and the other one you pull to the side.
Q. One is a lever that you pull up that way (illustrating)?
A. Yes.
Q. And the other you pull straight out?
A. Yes, sir.
Q. Which kind was this?
A. This was a major knuckle that you pull out.
Q. Pull straight out?
A. Yes.
Q. And the mechanism which controls that knuckle is
53 where in the form of the knuckle?
A. There is a lock-block on the side of the coupler.
Q. Well, the mechanism is on the inside of the coupler?
A. Yes, sir.
Q. How is that pin governed?
A. Well, this here pin-lifter, what they call a pin-lifter, is supposed to be shoved in against the drawbar.
Q. And when the knuckle is closed, how is this lever that you pull out,—is it out or in then?
A. It is in.
Q. When you got there how was it—out or in?

A. I don't remember.

Q. Did you test the coupler at all to see whether it would operate?

A. Yes, sir.

Q. And what did you do with it? What sort of a test did you make?

A. I closed the knuckle with my hand.

Q. You went in and put your hand on the knuckle and pushed it closed. Then I take it when you coupled up again, you opened it to make the coupling?

A. Yes.

Q. Did you open it with the pin-lifter or with your hand?

A. I opened it with my hand and the pin-lifter, both.

Q. Was it necessary to do that?

A. Yes, sir.

54 Q. That is, the coupler wouldn't open without your putting your hand on it?

A. Not unless you pull that rod out, that lever.

Q. But you didn't attempt to open the knuckle by pulling the rod after pushing with your hand, did you?

A. You can't open it unless you pull that lever out.

Q. I mean when you pull—you say that you pulled on the lever and put your hand on the knuckle; is that right?

A. That is the way to open your knuckle, pull the lever out and grab hold of the knuckle and pull it out, otherwise she is locked.

Q. You have to pull your lever out with one hand and pull the knuckle out with the other?

A. Yes.

Q. That is the only way you can do it, is it?

A. Yes, sir.

Q. About how far apart were the two sections of this train when you went back there after it come to a stop?

A. About six or seven car lengths.

Q. About how fast was this train running at the time it broke in two?

A. About twenty-five or thirty miles an hour.

Q. About how far do you think the front end of the train ran after the break?

A. I don't think over twenty-five car lengths.

Q. Not over twenty-five car lengths?

A. I don't think so.

Q. And the back end—is there any difference in the

55 space that was left there?

A. Yes.

Q. Do you know why the back end doesn't run as far as the front end when they break in two?

A. Well, the engine is working steam on the head end, that is why, the head end most naturally will be a little bit farther away from the rear end, the rear end will come to a stop before the head end will.

Q. The effect of the engine——

A. Working——

Q. The power on there conteracts the brakes, to a certain extent?
A. Yes, sir.
Q. There is nothing pulling the back portion except the momentum it had when the break occurred?
A. Yes, sir.
Q. So the back end will stop more violently than the front end?
A. Yes, sir.
Q. How many previous trips to the date of this accident had Mr. Gotschall made with you?
A. I don't know exactly.
Q. Well, as nearly as you can recollect?
A. Three or four trips.
Q. And had they all been over this same run?
A. Yes, sir.
Q. What was his capacity there? Was he an extra freight brakeman or a regular?
A. Well, I am sure I don't know.

Q. Do you know what his wages were at any
56 time?

A. Regular compensation of a brakeman.
Q. How much was that?
A. $2.78 for ten hours.
Q. Do you know whether he had made any trips with other conductors on other trains?
A. Yes, I know he worked before he came on with me.
Q. Do you know how much he had worked?
A. No, sir, I don't.
Q. After you opened this knuckle, you say you coupled up again?
A. Yes, sir.
Q. I suppose you signalled the engineer and he backed up and made the coupling?
A. Yes, sir.
Q. Then what did you do?
A. Give him a sign to go ahead.
Q. Did he go ahead?
A. He didn't go very far. He pulled a drawbar out about ten car lengths away from the engine.
Q. And that was between the point of the first break and the engine?
A. Yes, sir.
Q. When was that—right when he started, or did he run some little distance?
A. That is when he was trying to pull the train, start the train.
Q. Just about the time he took the slack in the train it pulled out up there?
A. Yes, sir.

Q. Did you go up to see what was the matter up
57 there?

A. Yes.
Q. What did you find up there?

A. I found the drawbar pulled out of the north end of the tenth or eleventh head car.

Q. Then what did you do?

A. I seen that the car had to be chained up, so I went over and inquired from the engineer if he had seen anything of the head brakeman. He says no.

Q. Had you seen anything of the head brakeman?

A. Not this time, no, sir.

Q. After you inquired that of the engineer, then what did you do?

A. I told him I had a drawbar pulled out of the north end of a car and the car had to be chained up and asked him if he wouldn't help me out.

Q. And did he?

A. He did.

Q. You went and chained it up, did you?

A. Chained the car up.

Q. Then what did you do?

A. Took them ten cars to Merriam Junction, the next station.

Q. You took all the cars ahead of this one with the drawbar pulled out of that car?

A. Took all the cars ahead of this one with the drawbar pulled out on that car.

Q. Into Merriam Junction?

A. Into Merriam Junction and set the cars out there on the sidetrack.

58 Q. You set all them out there, did you?

A. Yes.

Q. Then what did you do?

A. Then I went to work and notified the dispatcher; and I hadn't seen anything of the head brakeman, Gotschall——

Q. You notified the dispatcher at Merriam?

A. At Merriam.

Q. And what next?

A. And then I returned to the rear end of my train.

Q. When you took this portion of the train into Merriam and came back again, who went in there with you, what part of the train crew went in there?

A. I was the only one in the train crew that was there.

Q. Well, of the engine crew, then. I take it that you and the engineer and the fireman went in with the train and came back?

A. I don't remember if I went in alone or if the engineer went in there with me.

Q. You didn't run the train in, did you? You didn't run the engine in, did you, from the place of the break up to Merriam?

A. Why, the engineer he ran the engine. I was riding on this rear car.

Q. The fireman was on there, too, wasn't he?

A. The fireman was on the engine, yes.

Q. There was only two other men in the train crew, then?

A. Yes, sir.

59 Q. That was Gotschall and Murphy?

A. Yes, sir.

Q. About how much time was taken up in pulling this bunch of cars up to Merriam and returning to the scene of the accident?

A. Thirty minutes.

Q. When you got back there, what did you do?

A. When we got back there we started to search for brakeman Gotschall.

Q. And who started to search? You say "we."

A. The engineer and I.

Q. The fireman didn't accompany you?

A. No, sir.

Q. And what was this search? Tell us what you found and where you went?

A. Well, we both walked down on the engineer's side of the train searching in empty cars and looking around the bushes, the weeds by the right-of-way there, to see if we couldn't locate him. We thought probably he got hurt, as long as he hadn't showed up all the time that we was around there in fixing up this bad-order car and getting out there with our head end, so both of us walked back to the rear end of the caboose on the engineer's side, and we didn't locate him. So the engineer says, "I will walk back to the engine," and I says, "All right, I will stay back here and make out a report in regards to that bad-order car and the trouble we have been having." And he goes back to the engine on the fireman's side, and when I was sitting in the caboose there he let a holler out of him, told me he had found him, and so I went running up there and we found him cut in two, on the fireman's side.

Q. In what position was the body in reference to the tracks when you found him?

A. Well, the upper portion of his body was on the outside of the rail and the trunk was between the rails.

Q. Did you make any examination of the wheels or trucks of the cars ahead of that to determine how many cars had run over him, blood spots or flesh or anything of that kind.

A. Well, I think there was seven cars run over him.

Q. Did you make an examination of the wheels and trucks to find that out?

A. Yes, sir.

Q. About how far back was his body found from the point where the first break occurred?

A. About seven car lengths.

Q. Seven car lengths back from where the first break occurred?

A. Yes, sir.

Q. Did he have his lantern with him when you found the body there?

A. Yes, sir.

Q. And what condition was the lantern in?

A. The lamp was out and the globe was broke.

Q. Where was the rear brakeman during all this time?

A. He was back flagging the time freight.

Q. That is, he went back along the track to protect the rear end of your train?

61 A. Yes, sir.

Q. Where was the fireman during all this time?

A. He was on the engine.

Q. So that you and J. R. Gotschall were the only two who saw the body?

A. Yes, sir.

Q. And you were the only man that saw the original break, the first break?

A. Yes, sir.

Q. What was the condition of the track there as to being straight or curved?

A. Well, it is kind of a reverse curve there right where we broke in two.

Q. Where you broke in two, is that on a reverse curve?

A. Yes, sir.

Q. And on what part of the curve is it?

A. Well, it is on the first part.

Q. By reverse curve, you mean a letter "S", don't you, just about a letter "S"?

A. Yes, sir.

Q. They came in like a double curve?

A. Yes, it broke on the first curve.

Q. Were you just leaving the reverse curve or just entering upon it when it broke in two?

A. Just entering.

Q. Just entering upon it. And as to the tracks being level, in good condition there, what do you know about that?

A. The track was in good condition; there was no speed restrictions on that track.

Q. No speed restrictions on it?

62 A. No, sir.

Q. Now, as a general rule, do these couples pull apart when the train is in motion?

Objected to as immaterial and irrelevant.

Q. How long had you known Gotschall prior to the accident?

A. About two months.

Q. You are working in the same capacity for the defendant company now that you were at the time the accident occurred?

A. Yes, sir.

Q. You testified on the former trial of this case also?

A. Yes, sir.

Cross-examination.

By Mr. Miner:

Q. And you were subpœnaed here by the plaintiff?

A. Yes, sir.

Q. These couplers, you say, where the separation occurred, were new couplers?

A. Yes, sir.

Q. And when you got back to the point where this separation had

occurred, you found the knuckle on the south end of the north car, that is, the car that was attached to the string still going with the engine, swung open?

A. Yes, sir.

Q. These were automatic couplers?

A. Yes, sir.

Q. What are called automatic couplers?

A. Yes, sir.

63 Q. And after you gave the signal, the engineer moved the north section of the train back and the coupling was made automatically between those two cars again, was it not?

A. Yes, sir.

Q. And you went right along?

A. Yes, sir.

Q. You say there were several gondola cars in your train but you don't know at what point in the train they were located?

A. No, I don't.

Q. You don't know whether there were any gondola cars in the rear section, the section that separated from the engine or not?

A. No, sir.

Q. They may have all been there or they may have all been in the other part, so far as you know?

A. Yes, sir.

Q. A brakeman in walking over that train from the caboose to the engine would of necessity have to climb off from the box cars down on to the gondola cars and walk the length of the gondola car and then climb up on to the box car again, would he not?

A. Yes, sir.

Mr. Pettijohn: That is assuming, I take it, that they were in the rear portion.

Mr. Miner: I say walking from the caboose to the engine, a brakeman would have to pass over the gondola cars, of course, no matter where they were located in the train.

Witness: Yes, sir.

64 Q. And to do that would have to descend from a box car and walk over the gondola car and ascend on to the next box car and repeat that with each gondola car that there was in the train?

A. Yes, sir.

Q. Did I understand you to say that in your opinion the train ran about twenty-five car lengths before it stopped after the separation occurred?

A. Well, more or less. I can't say exactly how far they did run.

Q. That is your judgment at the present time?

A. Yes, sir.

Q. And as I understand you, when you got back there the two sections of the train were separated by an open space that was about equal in length to eight or ten cars?

A. Something like that, seven car lengths—six or seven car lengths.

Q. Six or seven car lengths?
A. Something like that.
Q. Well, you testified to that—did you say four or five in your direct examination?
A. I can't say how much of a space was between the two portions, but there was——
Q. Well, on the former trial were you asked this question, and did you make this answer: "Q. When you got to that place, how far were the cars apart? A. Five or six car lengths, I should judge."
A. I guess something like that.
Q. And that is your best judgment now, is it?
A. Yes, sir.

Q. You have spoken several times here about the train
65 breaking in two. What you mean by that is that these two sections of the train were simply separated?

A. Yes, sir, separated.
Q. You didn't find anything broken?
A. No, sir.
Q. Nor anything wrong so far as you could discern?
A. No, sir.

Redirect examination.

By Mr. Pettijohn:

Q. About how long did it take to run from Jordan to the scene of the accident that night?
A. Oh, about seven to ten minutes.
Q. About how long did you stay back there after this break occurred before you coupled up again?
A. For about two minutes.
Q. You walked from the engine back to the place of the break?
A. Yes, sir.
Q. Did you examine both cars at the point of the break or only the one on which you found the knuckle open?
A. Just the one where the knuckle was open.
Q. You didn't examine the knuckle on the other car that was attached to the rear end at all?
A. No, sir.
Q. Didn't go back there?
A. No, sir.

By Mr. Miner:

Q. If one knuckle is open, two cars will couple automat-
66 ically, will they not?

A. Yes, sir.
Q. So that in order to make an automatic coupling it is only necessary that one knuckle should be open?
A. Yes, sir.
Q. When you brought these cars together with the knuckle open on the car that you examined, the cars coupled automatically?
A. Yes, sir.

By Mr. Pettijohn:

Q. They will couple, however, if both knuckles are open, won't they?

A. Sometimes they will and sometimes they won't.

Q. They can be coupled that way?

A. Yes, sir.

Q. It isn't the proper way to couple, but they will make a coupling generally if both knuckles are open?

A. Yes. Sometimes we open them just halfway, just the knuckle halfway in order to make a coupling without making a failure out of it, to make the coupling the first time.

Mr. Pettijohn: I had the rear brakeman under subpœna, your Honor.

Mr. Miner: You may read his testimony given on the other trial, if you want to; I have no objection.

Testimony of Michael Murphy read in evidence by Mr. Pettijohn, as follows:

67 MICHAEL MURPHY, sworn on behalf of plaintiff, testified:

By Mr. Duxbury:

Q. Your name is Michael Murphy?

A. Yes, sir.

Q. And you live where?

A. 4449 First avenue South.

Q. Minneapolis?

A. Yes, sir.

Q. How long have you lived there?

A. About a year and six months.

Q. And how old are you?

A. Twenty-three.

Q. And how long have you been railroading?

A. About a year and three months.

Q. The length of your railroading has been with the M. & St. L.?

A. Yes, sir.

Q. And you are still brakeman?

A. Yes, sir.

Q. Were you a brakeman on the night that Merlin Gotschall got killed?

A. Yes, sir.

Q. Were you on that same train?

A. Yes, sir.

Q. You were what they call the rear brakeman?

A. Yes, sir.

Q. And this accident, I suppose, happened there about two miles north of Jordan?

A. Yes, sir, about two miles.

Q. And as you stopped at Jordan what did you do?

68 A. Why, I got out and looked over the train.

Q. What do you mean by "looked over the train?"

A. To see if there was any break or damage done, anything the matter with the train, anything dragging.

Q. Looked to see if there was anything wrong?

A. Yes, sir.

Q. Clear up to the head end?

A. Oh, no, I didn't get up about halfway, I judge; I don't remember just how far I did get.

Q. Did you see Gotschall?

A. Well, I seen him; he was about four or five car lengths from me, yes when the engineer whistled for a high-ball; I gave him a high-ball, and Gotschall answered, and we started out of town. The last I seen of Gotschall he was climbing on top of the cars.

Q. That was just as you were moving out of Jordan?

A. Yes, sir.

Q. And about how far back on the train?

A. Was he, you mean?

Q. Yes.

A. Oh, I should judge a little over halfways, maybe.

Q. A little over halfway back?

A. Yes.

Q. What do you mean "the engineer whistled for a high-ball?" You know there are lots of kinds of high-balls. The jury wants to know what a high-ball is.

69 A. Well, it is customary, when he stops any place, for the brakeman to look over the train, then, when he is ready to start, why, he whistles twice, and if we give him a high-ball, that is a sign like that, with the lantern (indicating).

Q. That is "All right," "Go ahead?"

A. "All right," "go ahead."

Q. And wherever you are on the train, you jump on the train and get to cover; either end you stop on, is that the idea?

A. Well, the brakeman gets on the hind end and waits for the caboose.

Q. The head man can wait a little while, then he climbs up and travels over the top?

A. To the head end, yes.

Q. That is the way you do that work?

A. Yes, sir.

Q. Now, on that night after you started out there, what happened on that train that you recollect of?

A. Which?

Q. After you left Jordan.

A. After we left Jordan?

Q. Yes.

A. Well, after we started I got on the hind end and I stood on the hind end until we got outside of the switches, and I noticed my lamp was getting dim, and I got in and started to fix my lamp up. I should judge we went about two miles out when the train stopped; it was going about twenty-five miles an hour; it stopped gradually, but—first it did jar a little. And when she stopped I put the

70 globe in my lamp and went out on the hind end to see if I could see anything, and I couldn't see anything. We was

running ahead of a fast freight there, and I went in and got the red lamp and stood on the caboose steps, and see if they was going to start, and they didn't start, and I walked back and stood there.

Q. It is your business to go back and flag?

A. Yes, sir, flag.

Q. And that is what you did do?

A. Yes, sir.

Q. Well, did you see anything more of Gotschall that night?

A. No, not after we left Jordan, no.

Q. You didn't go up to the place of the break?

A. No.

Q. You went back how far beyond the train there to flag?

A. Oh, from a mile and a half to two miles.

Q. Then when they whistled you in you came up and took him—as soon as you got in, why, you went away?

A. Went to Merriam, yes.

No cross examination.

EVERETT J. GOTSCHALL, sworn on behalf of plaintiff, testified.

By Mr. Pettijohn:

Q. Your full name is Everett J. Gotschall?

A. Yes, sir.

Q. Where do you live?

A. Delhart, Texas.

71 Q. For how long a time have you made your home in Delhart, Texas?

A. Since a year ago.

Q. What relation were you to Merlin E. Gotschall, the boy that was killed?

A. Father.

Q. How old was Merlin at the time of his death?

A. Twenty years, one month and one day.

Q. What is the date of his birth?

A. July 8th.

Q. At the time this accident occurred where were you?

A. I was at Superior, Wisconsin, working for the Great Northern.

Q. In what capacity were you working?

A. Locomotive engineer.

Q. How long have you been a locomotive engineer?

A. About twelve years.

Q. And how long had it been previous to this accident since Merlin had left home to go to work?

A. Well, he never ever left home practically, to say to leave home. He had been away from me off and on for two years, a couple of years, something like that.

Q. By "off and on" how much of the time had he been away?

A. Well, most of the time. He had been with his grandmother most of the time.

Q. Do you know of your own knowledge what he was doing during those two years?

A. Well, he was working for the Minneapolis & St. Louis when he got killed.

72 Q. But before he went to work for them do you know what he was doing?

A. He worked in a jewelry store for awhile, for one thing. He worked at different jobs, I guess, off and on.

Q. Have you any other children beside Merlin?

A. I have a daughter, yes, sir.

Q. How old is she now?

A. She is about nineteen. She will soon be twenty. She will be twenty the 2nd day of January.

Q. Whereabouts does she live?

A. Shawnee, Oklahoma.

Q. Is she married or single at this time?

A. She is married.

Q. Was she at the time this accident occurred?

A. No, sir.

Q. Was she at the time of the first trial of this case?

A. Yes, I believe she was.

Q. His grandmother that you spoke of is the Nora Gotschall who is named as the plaintiff in this case?

A. Yes, sir.

Q. She is your mother?

A. Yes, sir.

Q. She is also the mother of J. R. Gotschall, the engineer that was on this train?

A. Yes, sir.

Q. And who petitioned for her appointment as administratrix?

Objected to as immaterial.

73 Objection sustained.

Q. At the time this accident occurred were you a resident of the state of Minnesota?

A. No, sir.

Q. What education had Merlin had before he left home?

A. Oh, he went to school all his life until he left home or went away, came to his grandmother's.

Q. How far did he get in school?

A. I think he was about through high school.

Q. How about his having been industrious?

A. Well, he had always been industrious, always had something to do.

Q. While he was going to high school did he do any work?

A. Why, he did odd jobs, yes.

Q. Earn any money during those times?

A. He earned a little.

Q. At any time previous to his death had he contributed any money towards the support of yourself or your wife?

A. No.

Q. Had he, while he was living at home, done any work around the house or anything of that sort?

A. Oh, yes, he always done whatever there was to do around the house.

Q. While you were out on the road was there any other men around the house excepting him?

A. Yes, a few men there.

Q. That were living there?

A. Yes, sir.

74 Q. Were they doing any of the work around the house?

A. No, sir.

Q. You never had called upon him to give you any money, had you?

A. No, sir.

Q. Never had asked him to give you any of his earnings?

A. No, sir.

Q. Do you know whether or not he had given any money to any other members of the family?

Mr. Miner: Wait a moment; what do you mean by that?

Mr. Pettijohn: Sister.

Mr. Miner: His sister or mother? I don't object to that.

A. I don't know.

Q. Do you know whether or not he had contributed any money to your mother?

Objected to as immaterial.

Objection sustained.

Q. When did you see Merlin after the date of this accident?

A. Why, I seen him in the evening of the 9th. After the accident, you mean?

Q. That is, you saw the remains of his body?

A. Yes, sir.

Q. Whereabouts did you see those?

A. Rainville undertaking establishment, Minneapolis.

Q. What day was he buried?

A. The 13th, something like that.

75 Q. Who paid the funeral expenses, if you know?

A. I did.

Q. To whom did you pay them?

A. To Rainville.

Q. And what was the amount of the funeral expenses?

A. Well, I don't remember exactly now. I have the receipts at home.

Objected to as incompetent and immaterial.

Objection sustained.

By Mr. Miner:

Q. Mr. Gotschall, at the time that this accident occurred, Merlin's mother was not living, was she?

A. No, sir.

Q. You were living with a second wife?
A. Yes, sir.

Mrs. NORA GOTSCHALL, sworn on her own behalf, testified.

By Mr. Pettijohn:

Q. Your name is Mrs. Mary Gottschall?
A. Yes, sir.
Q. You are the party in whose name this action is brought?
A. Yes, sir.
Q. As administratrix of the estate of Merlin Gotschall, deceased?
A. Yes, sir.
Q. What relation were you to Merlin Gotschall?
A. My grandson, all the grandson I had.
Q. The only grandson you had?
A. Yes, sir.

76 Q. And before the date when he met with this accident which resulted in his death, where was he living?
A. He was living with me.
Q. And where was that?
A. At 2021 Garfield avenue, Minneapolis.
Q. For how long a time had he been living with you?
A. Off and on for two years.
Q. And what had he been doing, if you know, during those two years?
A. Why, he was working at different things. He worked in a pharmacy a while and a jewelry store awhile and then he went home awhile and then come back and went to braking.
Q. And during all this time was he living with you?
A. Yes, sir.
Q. At this same address?
A. Yes, sir.
Q. Who else, if anyone, was living with you during all this time?
A. Nobody but my daughter. I am a widow woman.
Q. How old is your daughter?
A. She is twenty-three.
Q. Was Merlin boarding with you, paying board?
A. Yes, he paid his board, helped me along.

Mr. Miner: I move to strike out the last part of that answer.
Motion granted.

77 Q. How much of the time during these two years that he was with you was Merlin Working?
A. Most all the time.
Q. Do you know how much he earned at these different positions?
A. I do not.
Q. How much was he paying you for board?
A. $5 a week.
Q. And was he paying you anything else beside board?

Objected to as immaterial.
Objection sustained.

Q. What was his general conduct around the house as to performing duties or helping you out or anything of that kind?

Objected to as immaterial.

Mr. Pettijohn: As to his habits is all.

A. He was a good boy and willing to do anything that I wanted him to do. He helped do everything that was to do around the place, and saved me a good many dollars.

On motion, last part of answer stricken out.

Q. What was there to do around the place there that he did?

A. Well, there was always lots to do around a place,—now the yard and put on storm-windows and screen windows and doors, and all such things as that.

Q. How old is your son Everett?

A. 42.

Q. And Merlin's mother is dead?

A. Yes, sir.

Q. Do you know how long he had been working for the
78 Minneapolis & St. Louis Railroad Company previous to his death?

A. I do not just exactly.

Q. Well, as nearly as you can remember what was it?

A. I think about two months or three, I ain't certain which.

Q. If you testified on the former trial that it was three or four months, do you think that was correct, or would you say now two or three?

A. Well, I don't just exactly remember how long it was.

Q. How much of the time when he was working for the Minneapolis & St. Louis was he at home?

A. Well, he was gone a good part of the time working.

Q. I mean how often would he come home? Was he home every day or every other day or a couple of times a week?

A. A couple of times a week or three times.

Q. How long would he stay home when he came home that way?

A. Well, he would be in probably a day and night sometimes, sometimes not that long.

No cross examination.

Plaintiff rests.

Mr. Miner: It appears that the agents of the defendant who were in charge of this train have all appeared here and been examined or their testimony has been taken, so that the defendant has no
79 facts in connection with this matter which have not been placed before the Court. We have no further testimony to offer, so the defendant rests.

This suit being under the Federal law, I desire at this time to move the court to direct the jury to return a verdict on behalf of the defendant for the reason, first, that no negligence has been proven against the defendant and that no situation has been dis-

closed by reason of which the rule of res ipso loquitur could be applied here; that is, I think upon the evidence in this case we have met the test which obviates the application of that rule by showing that the particular contrivance here where this train separated was in the condition that there was nothing defective about it; that these couplers were automatic couplers and were new, all the parts were complete and the coupler was in working order as shown by the fact that the *coupler* was automatically made when the train backed up; secondly, for the reason that no basis for a recovery of damages has been established in proof, no contribution of any kind has been shown and no testimony has been introduced which can afford the basis for a finding as of fact that had the deceased lived he might or would have contributed to the only person shown to be entitled to an expectancy, that is the father.

Mr. Pettijohn: We object to it, your Honor.

Motion denied.

Mr. Miner: I move to dismiss this action for the reasons set forth in the motion already made.

Motion denied.

Recess till 2 o'clock p. m.

80 Afternoon Session.

Case summed up by respective counsel, whereupon the Court instructed the jury as follows:

Charge.

GENTLEMEN: This action is brought by Nora Gotschall, as administratrix, against the Minneapolis & St. Louis Railroad Company to recover damages for the death of Merlin E. Gotschall, caused by the negligence of the defendant, as the plaintiff alleges, on the 9th day of August, 1912.

It appears that Merlin E. Gotschall was employed by the defendant Railroad Company as a brakeman on a freight train at the time in question; that he was of the age of twenty years and some weeks; and it appears that he was upon a freight train as brakeman running from Albert Lea in this state to Minneapolis, and at a point, a station that has been alluded to on the way, he fell or was thrown from the train and was killed. It appears also that he left surviving him his father, Everett J. Gotschall; he had not been married and his mother was dead, and the action is brought for the benefit of the father, Everett J. Gotschall.

It is claimed upon the part of the plaintiff that he was thrown from the car by reason of a defective coupler on the train, and that the coupler was defective through the want of the exercise of proper care upon the part of the defendant.

The action is based upon the negligence of the defendant company. This claim upon the part of the plaintiff is denied by
81 the defendant. It is denied upon the part of the defendant that the coupler was defective, that it was guilty of any negli-

gence, and it is denied that he was thrown from the train by reason of any defect in the coupler. And so, there are or may be several questions of fact for your determination in the case, the ultimate question, of course, being whether the deceased met his death by reason of the fault of the defendant in the particulars named.

It appears that the train broke in two while proceeding toward the north at a point about two miles from the station of Jordan; that the train broke in two somewhere near the middle of the train, it being a train of about fifty freight cars, as I understand it, and the deceased was found after the train had broken in two and come to a standstill, lying across one of the rails, some of the cars having run over him and apparently caused his death.

It is claimed upon the part of the plaintiff that the train broke in two because of a defect in the coupler of one of the cars, and upon the breaking of the train in two the effect would be that the train would stop somewhat suddenly,—you heard the testimony bearing upon that question,—and it is claimed that the deceased (he being what is called the head brakeman) was in the course of his employment, proceeding over the top of the train toward the engine and that the sudden breaking and stoppage of the train caused him to fall from the train.

There is no dispute that the train broke in two; there is no dispute that the train stopped somewhat suddenly, and there is
82 no dispute that the deceased fell to the ground or was thrown to the ground; there is no dispute that he came to his death by reason of being thrown or falling from the train.

The first question for your determination, or one of the questions, and perhaps it is well to consider it first, is, what was the cause of the stopping of the train, the breaking of the train in two and the sudden stoppage? It is claimed, as I have said, upon the part of the plaintiff that the coupler, about which one or more of the witnesses has testified, was defective and that the defect caused the couplers to separate and therefore caused the train to come apart and set the brakes so that the train stopped; and it appears that the train parted because the couplers came apart, and it appears that the train stopped somewhat suddenly by reason of the parting of the couplers and the parting of the train.

Now, where, in the ordinary course of events, the apparatus works properly—and applying that principle to this case—if the coupler ordinarily would not separate under the circumstances in which this separated, the fact that this did separate, in the absence of an explanation as to what caused it, might raise a reasonable inference which the jury would be at liberty to draw that the coupler was defective and that it was in that condition because of a want of care upon the part of the defendant. It was the duty of the defendant company to exercise reasonable care to see that the coupler was in proper condition, and if it failed to do that, and the injury
83 resulted from that failure, then it would be guilty of negligence.

The company was not an absolute insurer of the safety of all its

appliances, but it was bound to exercise reasonable care—the care that men of ordinary prudence usually exercise under similar circumstances, care commensurate with the danger to be apprehended—to have proper appliances for use upon its trains. If it did that, then although the defendant found out afterward that there was a defect, it would not be liable. If it failed to do that and the injury resulted, as I have said, it would be liable.

And so, it is for you to say, under the evidence in this case, whether the negligence of the defendant is established in this regard, bearing in mind that the happening of the event, if under proper care it would not ordinarily happen, is evidence which the jury may take into consideration in determining that question. If there was no negligence upon the part of the defendant, that would be the end of your inquiry and it would not be necessary to go further into the case. But if you find that there was, then another question arises, was the injury to the deceased caused by the parting of the train.

There is no testimony of any witness who saw the deceased fall from the train. It is claimed upon the part of the plaintiff that the deceased was on his way across the train from the rear or rear portion of the train toward the engine where he was expected to be during the progress of the train, and that the circumstances
84 shown after his body was discovered indicate that he was thrown from the train at or about the time or place where the break occurred, or about that place, as I understand it, and it is claimed that the circumstances are such as to lead to the reasonable probability that his fall from the train was caused by the breaking apart of the train and the sudden stoppage.

On the other hand, it is claimed upon the part of the defendant that the circumstances do not point with reasonable probability to that fact; that insofar as appears from circumstances, he may have fallen from the train in some other way, his fall was caused by some other means.

Now, it is necessary in order to find that his fall was caused by a breaking apart of the train that the evidence should establish that fact with reasonable probability; that is, it must point to that as the probable cause of his falling from the train. It is not sufficient that you may guess that it happened in that way or conjecture that it happened in that way, but the facts and circumstances must be such as to warrant reasonably the conclusion that that was the manner in which the deceased was injured, and if the evidence should not be satisfactory upon that point to your minds, then it would be your duty to find for the defendant, and the plaintiff would not be entitled to recover. In other words, the burden of establishing the fact that the death of the deceased was caused in the manner claimed by the plaintiff is upon the plaintiff in this case; she must establish by a reasonable preponderance of the evidence that
85 the death was caused in the way set up, otherwise she cannot recover. The evidence must weigh somewhat heavier upon her side of the case in order to warrant a finding in her behalf.

If the plaintiff is entitled to recover, the question would then occur, how much is the plaintiff entitled to recover?

Now, the plaintiff, if entitled to recover at all, is entitled to recover the pecuniary loss which the father suffered by reason of the death of the son. Nothing can be recovered for wounded feelings or loss of society or anything of that sort, it is a mere matter of pecuniary loss, and it is to be based upon the reasonable expectation of pecuniary benefit from the continuance of the life of the son, that is, what reasonable expectation, so far as pecuniary benefit is concerned, what would reasonably be expected in that regard for the father if the life of the son had been continued. This is a matter, of course, of estimation largely. It is impossible to fix it with definite certainty, but it is proper to take into consideration, of course, the age of the son, his habits of industry or otherwise, his earning capacity at the time, the relation between himself and his father, and in view of the situation and circumstances to say, in the exercise of a wise judgment, what the father has been deprived of in a pecuniary way, if anything, by the death of the son at this time.

If you find for the plaintiff, your verdict would be for such an amount as you find based upon those considerations. Of
86 course the burden is upon the plaintiff also to establish the amount of the damage.

It is claimed upon the part of the defendant that the deceased himself failed to exercise reasonable care. He was bound to exercise reasonable care to protect himself from injury; that is, such care as men of ordinary prudence under similar circumstances usually exercise. If he failed to do that, it would not be a defense to recovery in this case but it would be a matter to consider in rendering your verdict on the amount of damages. Negligence upon his part is not to be presumed and it must appear by a fair preponderance of the evidence before it could be found to exist, and of course in the case of a person who is not alive, it is impossible upon his part to show exactly the situation and the circumstances, but he will be presumed to have taken proper care for his own safety unless it appears that he did not by a fair preponderance of the evidence in the case.

If you should not find that there was any negligence upon his part, then it would not be necessary to consider that question further. If you should find that he was guilty of negligence which contributed to his death, then you would take that into consideration in estimating the damages, in fixing the damages which you would return in your verdict, and in such case you would consider the entire negligence in the case both of the defendant and the deceased and you would deduct from the amount which the plaintiff might otherwise be entitled to an amount in the same proportion that the negligence of the deceased bears to the entire negligence
87 in the case. Perhaps it may be a little difficult for you to understand it in that way, but I think I can illustrate it in this way so that you will understand it: Suppose the negligence of both parties is estimated at 100 per cent and the negligence of the deceased is 50 per cent, and the negligence of the defendant 50 per

cent, then you would deduct from the entire amount otherwise to be allowed the 50 per cent, and in the same proportion either way. I think that states the proper rule, as I understand it.

If you find for the defendant, the form of your verdict would simply be that you find for the defendant. If you find for the plaintiff, your verdict would be that you find for the plaintiff and assess the damages at the sum (stating it) which you find the plaintiff entitled to recover.

If you should all agree, the foreman whom you will choose will sign the verdict and you will return it as the verdict of the jury. If after twelve hours' deliberation, you should not all agree but ten of you should agree, the ten agreeing will sign the verdict and return it as the verdict in the case. Put in the date and hour that you have agreed.

A sealed verdict was consented to and a stay of forty days entered.

Verdict.

A verdict was returned in favor of plaintiff in the sum of $2,500.

88 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Notice of Proposed Settled Case.

To Duxbury, Conzett & Pettijohn, Attorneys for Plaintiff:

You will please take notice, that the foregoing transcript consisting of 55 pages of typewritten matter is proposed by the defendant as the case to be settled and allowed by the Honorable Hascall R. Brill, the Judge who tried this cause, and that the said proposed case will be presented by the defendant to the said Judge in his chambers in the court house in the city of St. Paul, Ramsey county, on the 5th day of December, 1914, at ten o'clock A. M., or as soon thereafter as counsel can be heard for settlement and allowance.

W. H. BREMNER,
F. M. MINER,
Attorneys for Defendant.

Due and personal service of the foregoing proposed settled case, and of the foregoing notice in relation thereto is hereby admitted at St. Paul, Minnesota, this 28th day of November, 1914.

DUXBURY, CONZETT & PETTIJOHN,
Attorneys for Plaintiff.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Judge's Certificate.

I hereby certify that the foregoing case, consisting of 55 pages of typewritten matter, has been examined by me and found conformable to the truth and to contain all the evidence offered
89 or introduced on the trial of this cause, the charge in full and all objections, rulings, orders and all other proceedings of said trial, and I hereby settle and allow the same as the settled case herein.

All exhibits offered or received in said cause, and the verdict as rendered, may be considered as a part of the settled case the same as if included herein.

Dated this 12th day of December, 1914.

HASCAL R. BRILL, *Judge.*

Filed December 22nd, 1914, Matt Jensen, clerk.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Stipulation Settling Case.

It is hereby stipulated by and between the parties hereto that the foregoing proposed case, consisting of 55 pages of typewritten matter, containing all the evidence offered or introduced, all rulings, orders and objections and other proceedings on the trial of said case, and that the same is correct and, together with the verdict as rendered, is hereby constituted a settled case herein, and the same may be settled and allowed as the settled case herein by the Honorable Hascall R. Brill without notice.

It is further stipulated and agreed that all of the exhibits referred to in the settled case, together with the verdict as rendered, are part

thereof and shall be by the clerk of the District Court transmitted to the clerk of the Supreme Court on appeal.

90 Dated this 12th day of December, 1914.

DUXBURY, CONZETT & PETTIJOHN,
Attorneys for Plaintiff.
W. H. BREMNER,
F. M. MINER,
Attorneys for Defendant.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Notice of Motion for Judgment Notwithstanding the Verdict or for New Trial.

To Duxbury, Conzett & Pettijohn, Attorneys for Plaintiff:

Take notice that on the case settled herein, the defendant will move the court at its chambers in the court house in the city of St. Paul, Ramsey county, on the 5th day of December, 1914, at ten o'clock A. M., or as soon thereafter as counsel can be heard for an order for judgment in its behalf notwithstanding the verdict on the ground that the court erred in denying its motion for a directed verdict made at the close of all the testimony, and if that be denied, for an order setting aside the verdict herein and granting a new trial with costs on the following grounds:

1. That the verdict is not justified by the evidence and is contrary to law.

2. That the damages are excessive and appear to have been given by the jury under the influence of passion and prejudice.

3. That the court erred in denying defendant's motion at the close of the testimony to direct a verdict in defendant's

91 behalf.

4. That the court erred in denying said motion upon the first ground thereof, to-wit:

That upon the whole proof no negligence of any kind was proven against the defendant.

5. That the court erred in denying said motion upon the second ground thereof, to-wit:

That no evidence was offered as a legitimate basis upon which the jury could find any reasonable probability that the plaintiff's intestate, had he lived, would have contributed any sum whatever to his father, sole beneficiary under the Federal Employers' Liability Act.

6. That the court erred in instructing the jury in the following particulars to-wit:

"Now, where, in the ordinary course of events, the apparatus works properly—and applying that principle to this case, if the coupler ordinarily would not separate under the circumstances in which this separated, the fact that this did separate, in the absence of an explanation as to what caused it, might raise a reasonable inference which the jury would be at liberty to draw that the coupler was defective and that it was in that condition because of a want of care upon the part of the defendant. It was the duty of the defendant company to exercise reasonable care to see that the coupler was in proper condition, and if it failed to do that, and the injury resulted from that failure, then it would be guilty of negligence."

That such instruction was erroneous because the proof on the record uncontradicted is that the coupler was a new coupler,
92 perfect in all its parts and there is no proof that a coupler in such condition ordinarily would not or might not separate under circumstances which existed at the time and no proof of any failure on the part of the defendant to exercise reasonable care with respect to the coupler in question.

That such instruction is erroneous in that it authorized the jury to apply the rule of res ipsa loquitur and therefore placed a wrong construction upon the Federal Employers' Liability Act commonly known as the Act of Congress of April 22nd, 1908, and thereby deprived defendant of a right secured to it under said Act and the laws of the United States.

7. That the court erred in instructing the jury in the following particular, to-wit:

"If you should all agree, the foreman whom you will choose will sign the verdict and you will return it as the verdict of the jury. If after twelve hours' deliberation, you should not all agree, but ten of you should agree, the ten agreeing will sign the verdict and return it as the verdict in the case. Put in the date and the hour that you have agreed."

That such instruction was erroneous in that it deprived this defendant of a right secured to it by the Constitution and laws of the United States entitling the defendant upon the trial of this case, based upon the Federal Employers' Liability Act, to the unanimous verdict of a jury of twelve men.

W. H. BREMNER,
F. M. MINER,
Defendant's Attorneys.

93 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Order.

After hearing counsel for the respective parties, it is ordered, that defendant's motion for judgment in its behalf notwithstanding the verdict is denied.

It is ordered, that defendant's motion for a new trial is granted unless within fifteen days hereafter plaintiff files a stipulation in writing consenting that the amount of the verdict be reduced to $1,800, and if such stipulation is filed, the motion for a new trial will stand denied.

HASCAL R. BRILL,
District Judge.

Dated December 22, 1914.

Memorandum.

The points principally urged upon these motions are, first, that there is no evidence of negligence upon the part of the defendant; and, second, that there is no evidence that the father, for whose benefit the action is prosecuted, suffered any injury.

It is conceded that the evidence is the same as upon the former trial, with the exception hereinafter referred to. On appeal from the order of the Court in the former trial both these questions were presented to the Supreme Court, as appears from the record and the briefs, and the decision of that court was adverse to the contentions of defendant. That determination establishes the law of the case for this court.

Upon this trial the conductor, testifying to the conditions which he found after the cars separated, when he went back to in-
94 vestigate, said of the couplers: "They was both brand new." This did not appear at the former trial. This evidence is important as far as it goes, but it is not enough to render inapplicable the rule of res ipsa loquitur, which was held to apply to this case, or to overcome the effect of the application of that rule.

I do not find that the Supreme Court of the United States has held that under the Federal Act in order to recover for the benefit of the father it must appear that the father was dependent upon the son for support. The words "dependent" or "depending" are not used in the Federal Act in connection with the rights of the parent. It must undoubtedly appear, in order to recover, that there was a reasonable expectancy of pecuniary benefit from the continued life of

the son. It is the settled rule in this state that without special proof it is to be presumed that the life and employment of a son is of some pecuniary benefit to the father. Robel v. C. M. & St. P. Ry. Co., 35 Minn. 84; Youngquist v. Street Ry. Co., 102 Minn. 501. I can see no reason why that rule does not apply to this case.

I think under the proofs the damages awarded are excessive and they should be reduced.

BRILL, *J.*

Filed Dec. 22, 1914.
MATT JENSEN, *Clerk.*

Clerk's Certificate.

I, Matt Jensen, Clerk of the District Court, Ramsey county,
95 State of Minnesota, do hereby certify that I have compared the foregoing paper writing with the original order in this action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said court, at St. Paul, this 24th day of December, A. D. 1914.

[SEAL.]

MATT JENSEN, *Clerk,*
By C. R. SCHMIDT, *Deputy.*

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Notice of Appeal.

To W. R. Duxbury, C. N. Conzett and Lyle Pettijohn, Attorneys for Plaintiff, and Matt Jensen, Clerk of said District Court:

You will please take notice, that the defendant appeals to the Supreme Court of the state of Minnesota from a judgment entered on the verdict in said action on the 9th day of January, 1915.

W. H. BREMNER,
F. M. MINER,
Attorneys for Defendant.

Due and legal service of the above notice is hereby admitted this 27th day of January, 1915.

DUXBURY, CONZETT & PETTIJOHN,
Attorneys for Plaintiff.
MATT JENSEN,
Clerk of District Court.

96 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Bond on Appeal.

Know all men by these presents, that we, The Minneapolis & St. Louis Railroad Company, as principal, and United States Fidelity and Guaranty Company, as surety, are bound and firmly held unto the plaintiff in the above entitled action, in the sum of Two Thousand Five Hundred ($2,500.00) dollars to the payment of which to the said Nora Gotschall, as Administratrix of the estate of Merlin E. Gotschall, deceased, her heirs, executors, or administrators or assigns, we jointly and severally bind ourselves, our executors or assigns.

The condition of this obligation is such that,

Whereas, the said The Minneapolis & St. Louis Railroad Company, defendant in the above entitled action has appealed to the Supreme Court from a judgment entered on the verdict in said action on the 9th day of January, 1915.

Now therefore, if the appellant shall pay all the costs of said appeal and the damages sustained by the respondent in consequence thereof, if said judgment or any part thereof is affirmed, or said appeal dismissed, and abide and satisfy the judgment or order which the appellate court may give therein, then this obligation, which is given in pursuance of section 8003 of the General Statutes 1913, shall be void otherwise to remain in full force and effect.

In Testimony whereof we have hereunto set our hands this 27th day of January, 1915.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, [SEAL.]
By F. M. MINER, *General Attorney.*

UNITED STATES FIDELITY AND GUARANTY CO.,
By WIRT WILSON AND GEORGE E. MURPHY, [SEAL.]
Its Attorney in Fact.

In presence of
E. S. REDEL.
MAXWELL SUSSMAN.
E. J. HURLEY.

Filed Feb. 1, 1915. Matt Jensen, Clerk, by G. P. Ritt, Deputy.

97 STATE OF MINNESOTA,
County of Hennepin, ss:

On this 27th day of January, 1917, before me a Notary Public within and for said County and State, personally appeared Wirt Wilson and George E. Murphy, to me personally known, who being by me duly sworn upon oath did say that they are the Agents and Attorneys in fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of said Company, that the seal was affixed and the said instrument was executed by authority of its Board of Directors, and the said Wirt Wilson and George E. Murphy executed the said instrument as the free act and deed of said Company.

MAXWELL SUSSMAN, [SEAL.]
Notary Public, Hennepin County, Minn.

My commission expires Nov. 18, 1920.

STATE OF MINNESOTA,
County of Hennepin:

On this 29th day of January, 1915, before me appeared F. M. Miner, to me personally known, who, being by me duly sworn, did say that he is the General Attorney of the Minneapolis & St. Louis Railroad Company, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its board of directors; and said F. M. Miner acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] E. S. REDEL,
Notary Public, Hennepin County, Minn.

My commission expires June 19, 1917.

98 STATE OF MINNESOTA,
County of Ramsey:

Second Judicial District.

I, Matt Jensen, Clerk of the District Court, Ramsey County, and State of Minnesota, do hereby certify and return to the Honorable the Supreme Court of said State, that I have compared the foregoing paper writing with the original Notice of Appeal and Bond in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said Court, at St. Paul, this 1st day of February A. D. 1915.

MATT JENSEN, *Clerk,*
[SEAL.] By G. P. RITT, *Deputy.*

(Endorsed:) Filed Feb. 2 1915. I. A. Caswell, Clerk.

99 STATE OF MINNESOTA:

In Supreme Court, April Term, 1915.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Respondent,

vs.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Assignments of Error.

1. That the verdict is not justified by the evidence and is contrary to law.

2. That the damages are excessive and appear to have been given by the jury under the influence of passion or prejudice.

3. That the court erred in denying defendant's motion at the close of the testimony to direct a verdict in defendant's behalf.

4. That the court erred in denying said motion upon the first ground thereof, to-wit:

That upon the whole proof no negligence of any kind was proven against the defendant.

5. That the court erred in denying said motion upon the second ground thereof, to-wit:

That no evidence was offered as a legitimate basis upon which the jury could find any reasonable probability that the plaintiff's intestate, had he lived, would have contributed any sum whatever to his father, sole beneficiary under the Federal Employers' Liability Act.

6. That the court erred in instructing the jury in the following particulars, to-wit:

100 "Now, where, in the ordinary course of events, the apparatus works properly—and applying that principle to this case, if the coupler ordinarily would not separate under the circumstances in which this separated, the fact that this did separate, in the absence of an explanation as to what caused it, might raise a reasonable inference which the jury would be at liberty to draw that the coupler was defective and that it was in that condition because of a want of care upon the part of the defendant. It was the duty of the defendant company to exercise reasonable care to see that the coupler was in proper condition, and if it failed to do that, and the injury resulted from that failure, then it would be guilty of negligence."

That such instruction was erroneous because the proof on the record uncontradicted is that the coupler was a brand new coupler, perfect in all its parts, and no evidence was produced by the plaintiff to show the slightest defect in the coupler, or in the manner of its operation.

That such instruction was erroneous in that it authorized the jury to apply the rule of res ipsa loquitur, and therefore placed a wrong construction upon the Federal Employers' Liability Act, commonly

known as the Act of Congress of April 22nd, 1908, and thereby deprived the defendant of a right secured to it under said act and the laws of the United States.

7. That the court erred in instructing the jury in the following particular, to-wit:

"If you should all agree, the foreman whom you will choose will sign the verdict and you will return it as the verdict of the jury. If after twelve hours' deliberation, you should not all agree, but ten of you should agree, the ten agreeing will sign the verdict and return it as the verdict in the case. Put in the date and the hour that you have agreed."

101 That such instruction was erroneous in that it deprived this defendant of a right secured to it by the Constitution and Laws of the United States entitling the defendant upon the trial of this case, based upon the Federal Employers' Liability Act, to the unanimous verdict of a jury of twelve men, and for the reason that a court acting under the five-sixths jury law is not a court of competent jurisdiction for the trial of a cause based upon said Federal Employers' Liability Act, pursuant to the Constitution and Laws of the United States.

W. H. BREMNER,
F. M. MINER,
Attorneys for Appellant.

(Endorsed:) Filed May 7 1915. I. A. Caswell, Clerk.

102 STATE OF MINNESOTA,
Supreme Court:

Opinion filed June 11, 1915.
Register No. 19242.
April Term A. D. 1915.
Calendar No. 156.

NORA GOTSCHALL, as Adm., Respondent,
against
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Opinion and Syllabus.

(Endorsed:) Filed June 11th, 1915. I. A. Caswell, Clerk.

103 19242.

Syllabus.

1. The evidence in this case is substantially the same as in Gotschall v. M. & St. L. R. R. Co., 125 Minn. 525, 147 N. W. 430, which holds that the question of defendant's negligence was one of fact for the jury, and that the rule of res ipsa loquitur applies to the facts disclosed by the record.

2. The only new evidence relating to the condition of the couplers was that of the conductor of the train. Held, that, even with this evidence, the question of defendant's negligence was properly for the jury.

3. The other questions raised by the assignments of error herein are disposed of by Gotschall v. M. & St. L. R. R. Co., supra, and Lundeen v. G. N. Ry. Co., 150 N. W. 1088.

Judgment affirmed.

Opinion.

Plaintiff's intestate was killed while in defendant's service as a brakeman on one of its extra freight trains. This train was running north from Albert Lea to Minneapolis. At a point on the defendant's line near Jordan, Scott County, Minnesota, the train came apart. Deceased's body was found several car lengths south of the north end of the rear portion of the separated train, lying partly inside and partly outside the rails.

Plaintiff who is the duly appointed and qualified representative of deceased's estate, brought this action. The case was tried to a jury which returned a verdict for the plaintiff in the sum of $2,500.

Defendant moved for judgment notwithstanding the verdict or for a new trial. The motion for judgment was denied. The motion for a new trial was granted unless plaintiff would consent that the recovery be reduced to $1,800. Plaintiff filed her consent to such reduction. Judgment was entered for the plaintiff for $1,800
104 and costs January 9, 1915, from which judgment defendant appeals.

This case is governed by our former decision in Gotschall v. Minneapolis & St. Louis Railroad Company, 125 Minn. 525, 147 N. W. 430. In that case it was held that the question in defendant's negligence was one of fact for the jury, and that the rule of res ipsa loquitur applies to the facts disclosed by the record.

The only new fact that it is claimed is presented by the present record relates to the question as to whether or not the couplers between the cars which came apart were in a proper condition. The only evidence on this question was the testimony of the conductor of the train, who in speaking of these couplers said: "They was both brand new couplers." This evidence, it is contended, ought to modify the views expressed in the former decision. Perhaps standing alone this evidence might have some persuasive force in that direction, but the same witness testified that he made no examination of one of the couplers and also testified that the one he examined was partly open and that cars will make a coupling generally if both knuckles are open. We still think that, even with this evidence, the question of defendant's negligence was properly for the jury.

The other questions raised by appellant are disposed of adversely to its contention by the decision in Gotschall v. M. & St. L. R. R. Co., supra, and the decision in the case of Lundeen v. G. N. Ry. Co., 150 N. W. 1088.

Judgment affirmed.

SCHALLER, J.

105 STATE OF MINNESOTA:

In Supreme Court, April Term, A. D. 1913.

NORA GOTSCHALL, as Administratrix, Respondent,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

It is hereby stipulated and agreed by and between the parties in the above entitled action by their respective attorneys that the Clerk of the said Court shall enter judgment in the said cause for the amount of the judgment of the District Court and interest and the costs of this Court.

W. H. BREMNER AND
F. M. MINER,
Attorneys for Appellant.
DUXBURY, CONZETT & PETTIJOHN,
Attorneys for Respondent.

(Endorsed:) Filed Jul- 7, 1915. I. A. Caswell, Clerk.

106 STATE OF MINNESOTA:

Supreme Court.

No. 19242.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Respondent,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Judgment Roll.

(Endorsed:) Filed July 9, 1915. I. A. Caswell, Clerk.

107 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1915.

No. 156.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Respondent,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this case June 11, A. D. 1915,

It is here and hereby determined and adjudged that the judg-

ment of the Court below, herein appealed from, to-wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey be and the same hereby is in all things affirmed. And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Two Thousand Thirteen and 61/100 Dollars, ($2,013.61) including costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed July 9, A. D. 1915.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs	$25.00
Printer	$5.00
Clerk	$10.00
Acknowledgments	$0.25
Return	$—
Postage and Express	$—
Filing Mandate	$—
Judgment and interest of District Court	$1,973.36
Total	$2,013.61

108 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, July 9, A. D. 1915.

[SEAL.] I. A. CASWELL, *Clerk.*

State of Minnesota, Supreme Court. Transcript of Judgment. Filed July 9, A. D. 1915. I. A. Caswell, Clerk.

109 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Nora Gotschall, as Administratrix of the estate of Merlin E. Gotschall, deceased, Respondent, vs. The Minneapolis & St. Louis Railroad Company, Appellant, and also of the opinion of the court rendered therein together with the assignment of errors, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 20th day of September, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

110 STATE OF MINNESOTA:

In Supreme Court.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Respondent,

vs.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Assignments of Errors.

Comes now the appellant and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above entitled cause:

1. That the Supreme Court of the State of Minnesota erred in affirming the judgment of the District Court of Ramsey County, Minn., and in holding and decreeing that the Respondent, Nora Gotschall, as Administratrix of the estate of Merlin E. Gotschall, deceased, was entitled to recover from the Appellant, The Minneapolis & St. Louis Railroad Company.

2. That the Supreme Court of the State of Minnesota erred in finding, holding and decreeing that the appellant, The Minneapolis & St. Louis Railroad Company was not entitled to judgment in its favor notwithstanding the verdict.

3. That the Supreme Court of the State of Minnesota erred in holding and decreeing that the appellant, The Minneapolis & St. Louis Railroad Company, was not entitled to a new trial.

4. That the Supreme Court of the State of Minnesota erred in entering final judgment in favor of said Respondent and against this Appellant.

5. That the Supreme Court of Minnesota erred in holding,
111 adjudging and decreeing that upon the evidence presented upon the trial of this cause, the rule of res ipsa loquitur applied and that upon the state of the proof and by the application of said rule the jury was warranted in finding that the Appellant was negligent and that its negligence was the proximate cause of the death of Respondent's testate, and that by so holding, adjudging and decreeing, deprived the Appellant of a right guaranteed to it by that act of Congress passed June 22nd, 1908, 35 Statutes at Large 65, Chap. 149 commonly known as the Federal Employers' Liability Act.

6. That the Supreme Court of the State of Minnesota erred in holding, adjudging and decreeing that the complaint in this action

was sufficient in stating facts and circumstances as furnishing a basis for proof of contribution on the part of said deceased and to sustain a recovery in this case on behalf of his beneficiary, and in holding, adjudging and decreeing that the testimony offered by plaintiff upon the trial of said cause, was sufficient to warrant the jury in finding as a fact, that had the deceased survived, he would probably have contributed to his Father the sum found by the verdict, or any other sum, and that by so holding, adjudging and decreeing, the Supreme Court of Minnesota deprived this Appellant of a right guaranteed to it by that act of Congress passed June 22nd, 1908, 35 Statutes at Large 65, Chap. 149, commonly known as the Federal Employers' Liability Act.

W. H. BREMNER,
F. M. MINER,
Attorneys for Appellant and Plaintiff in Error.

111½ [Endorsed:] State of Minnesota. In Supreme Court. Nora Gotschall, as Administratrix of the estate of Merlin E. Gotschall, deceased, Respondent, vs. The Minneapolis & St. Louis Railroad Company, Appellant. Assignment of Errors. Filed Sep. 15, 1915. I. A. Caswell, clerk.

112 In Supreme Court of the United States.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Plaintiff in Error,
vs.
NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Defendant in Error.

Petition for Writ of Error.

To the Honorable Edward Douglass White, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Minneapolis & St. Louis Railroad Company, the plaintiff in the above entitled cause, shows by this petition to this Honorable Court, that in the records, proceedings and decisions in the Supreme Court of the State of Minnesota, the same being the highest court of said State in which a decision could be had in this suit, a manifest error has occurred, greatly to the damage of said The Minneapolis & St. Louis Railroad Company, Plaintiff in Error.

That, as appears in the record and proceedings there was drawn in question certain statutes of the United States, viz., the act of June 22, 1908, 35 Statutes at Large 65, Chap. 149, being an act relating to the Liability of common carriers by railroads to their employes in certain cases and commonly known as the "Employers' Liability Act," together with all amendments to said act and each thereof passed by Congress since said statute was first enacted; all of which fully appears in the records and proceedings of the case

and is specifically set forth in the assignment of errors filed herewith.

Wherefore petitioner prays that a writ of error be allowed, and that a transcript of record, proceedings and papers upon which said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C.,
113 under the rules of such court in such cases made and provided, and that the same may be by this Honorable Court inspected and corrected in accordance with law and justice.

W. H. BREMNER,
F. M. MINER,
Solicitors for Plaintiff in Error.

113½ [Endorsed:] In Supreme Court of the United States. The Minneapolis & St. Louis Railroad Company, Plaintiff in Error, vs. Nora Gotschall, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Defendant in Error. Petition for Writ of Error. Allowed Sep. 10, 1915. William R. Day, Associate Justice, U. S. Sup. Ct. Due Service of the within is admitted this 15th day of Sept. 1915. W. R. Duxbury, Solicitor for Defendant in Error. Filed Sep. 15, 1915. I. A. Caswell, clerk.

114 STATE OF MINNESOTA:

In Supreme Court.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Respondent,

vs.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Bond on Writ of Error.

Know all men by these presents, that we, The Minneapolis & St. Louis Railroad Company, a Minnesota corporation, as principal, and the United States Fidelity & Guaranty Company, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto Nora Gotschall, as Administratrix of the Estate of Merlin E. Gotschall, deceased, in the full and just sum of Two Thousand ($2,000.00) Dollars to be paid to the said Nora Gotschall, as Administratrix of the Estate of Merlin E. Gotschall, deceased, her executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our successors representatives and assigns firmly by these presents.

Sealed with our seals and dated this 7″ day of July, 1915.

Whereas, lately at a session of the Supreme Court of the State of Minnesota in a suit pending in said court between Nora Gotschall, as Administratrix of the Estate of Merlin E. Gotschall, deceased, Respondent, and The Minneapolis & St. Louis Railroad Company,

Appellant, a final judgment was rendered against the said Appellant, and the said The Minneapolis & St. Louis Railroad Com-
115 pany, Appellant, having obtained from said Court a Writ of Error to reverse the Judgment in the aforesaid suit, and a citation addressed to the said Nora Gotschall, as Administratrix of the Estate of Merlin E. Gotschall, deceased, is about to be issued citing and admonishing *him* to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date thereof.

Now the condition of the above *application* is such that if the said The Minneapolis & St. Louis Railroad Company shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make this appeal good, then the above obligation to be void, otherwise to remain in full force and virtue.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,
By F. M. MINER, [SEAL.]
Its General Attorney.
UNITED STATES FIDELITY & GUARANTY CO.,
By E. A. FORCE AND [SEAL.]
GEORGE E. MURPHY,
Its Attorneys-in-Fact.

In presence of
B. W. SCALLEN.
MAXWELL SUSSMAN.

Approved Sep. 10, 1915.
WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 7th day of July, 1915, before me, a Notary Public within and for said County and State, personally appeared E. A. Force and George E. Murphy, to me personally known, who being by me duly sworn upon oath did say that they are the Agents and Attorneys in Fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument
116 is the seal of said Company; that the said seal was affixed and the said instrument was executed by the authority of its Board of Directors; and the said E. A. Force and George E. Murphy did acknowledge that they executed the said instrument as the free act and deed of said Company.

[SEAL.] BLANCHE W. SCALLEN,
Notary Public, Hennepin County, Minnesota.

My commission expires Feb. 1st, 1916.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 7 day of July, 1915, before me appeared F. M. Miner to me personally known, who, being by me duly sworn, did say that he is the General Attorney of The Minneapolis & St. Louis Railroad Company, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation, by authority of its board of directors; and said F. M. Miner acknowledged said instrument to be the free act and deed of said corporation.

E. S. REDEL,
Notary Public, Hennepin Co., Minn.

My commission expires June 19, 1917.

(Endorsed:) Filed Sep. 15, 1915. I. A. Caswell, Clerk.

117 In Supreme Court of the United States.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Plaintiff in Error,
vs.
NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Defendant in Error.

Writ of Error.

The President of the United States to the Honorable Judges of the Supreme Court of the State of Minnesota, Greetings:

Whereas in the record and proceedings and in the rendition of the judgment of the above entitled cause which is now before you or some of you between Nora Gotschall, as Administratrix of the estate of Merlin E. Gotschall, deceased, vs. The Minneapolis & St. Louis Railroad Company, defendant, your court being the highest court of said state having jurisdiction of the cause, there was drawn in question the construction of certain statutes of the United States, viz. the act of June 22, 1908, 35 Statutes at Large 65, Chap. 149, being an act relating to the liability of common carriers by railroads to their employes in certain cases and commonly known as the "Employers' Liability Act," together with all amendments to said act and each thereof passed by Congress since said statute was first enacted; and the decision was against the validity of the construction of said statute contended for by plaintiff in error and against the title, right, privilege or exemption specially set up or claimed under said statute and the constitution and laws of the United States, and whereas there is manifest error in said decision to the damage of The Minneapolis & St. Louis Railroad Company, the petitioner in error, and whereas we are willing if there is error it should be duly corrected, we command you therefore, if judgment be given therein,

that you send under seal of your court, the record and pro-
118 ceedings in said cause to the Supreme Court of the United
— together with this writ, within such time as may be necessary in order that you have the same at Washington on the 9 day of October, 1915, that the record may be then inspected by the Supreme Court of the United States to be then and there held in order that justice may be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States that 15th day of September, A. D. 1915.

[Seal U. S. District Court, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of U. S. District Court, District of Minnesota,
By MARGARET L. MULLANE,
Deputy Clerk.

Allowed upon Plaintiff in Error giving bond in the sum of Two thousand Dollars according to law.

WILLIAM R. DAY,
Justice of the Supreme Court of the United States.

September 10, 1915.

[Endorsed:] In Supreme Court of United States. The Minneapolis & St. Louis Railroad Company, Plaintiff in Error, vs. Nora Gotschall, as Administratrix of the estate of Merlin E. Gotschall, deceased, Defendant in Error. Writ of Error. Due service of the within writ is admitted this 15th day of Sept., 1915. W. R. Duxbury, Solicitors for defendant in error. Filed Sep. 15, 1915. I. A. Caswell, Clerk.

119 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on September 15, 1915, in the matter of Nora Gotschall, as Administratrix of the estate of Merlin E. Gotschall, deceased, Respondent, vs. The Minneapolis & St. Louis Railroad Company, Appellant,

1. The original bond of which a copy is herein set forth;
2. Copies of the writ of error, as herein set forth,—one for each defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 20th day of September, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

120 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Nora Gotschall, Greetings:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Minnesota, wherein The Minneapolis & St. Louis Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decision rendered against the said plaintiff in error, as in the writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Wm. R. Day, Justice of the Supreme Court of the United States this 10 day of September, A. D. 1915.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

120½ [Endorsed:] Original. In Supreme Court of United States. The Minneapolis & St. Louis Railroad Company, Plaintiff in Error, vs. Nora Gotschall, as Administratrix of the estate of Merlin E. Gotschall, deceased, Defendant in Error. Præcipe for Appearance. Service of the within is admitted this 15 day of Sept., 1915. W. R. Duxbury, Solicitor for Defendant in Error. Filed Sep. 15, 1915. I. A. Caswell, Clerk.

121 STATE OF MINNESOTA:

In Supreme Court.

NORA GOTSCHALL, as Administratrix of the Estate of Merlin E. Gotschall, Deceased, Respondent,

vs.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Præcipe for Transcript on Appeal.

I. A. Caswell, Clerk of the Supreme Court of the State of Minnesota:

In preparing the transcript in the above entitled cause for transmission to the Supreme Court of the United States in pursuance of the Writ of Error allowed in said cause you will please include therein the entire record as found in your office.

W. H. BREMNER,
F. M. MINER,
Solicitors for Appellant and Plaintiff in Error.

Service of the within Præcipe and receipt of copy thereof admitted this 15 day of Sept., 1915.

W. R. DUXBURY,
Solicitor for Nora Gotschall, Respondent and Defendant in Error.

121½ [Endorsed:] State of Minnesota. In Supreme Court. Nora Gotschall, as Administratrix of the Estate of Merlin E. Gotschall, deceased, Respondent, vs. The Minneapolis & St. Louis Railroad Company, Appellant. Præcipe for Transcript on Appeal. Filed Sep. 15, 1915. I. A. Caswell, Clerk.

122 UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Minnesota, at my office, in the city of St. Paul, Minnesota, this 20th day of September, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

123 [Endorsed:] State of Minnesota, Supreme Court.

Endorsed on cover: File No. 24,929. Minnesota Supreme Court. Term No. 646. The Minneapolis & St. Louis Railroad Company, plaintiff in error, vs. Nora Gotschall, as administratrix of the estate of Merlin E. Gotschall, deceased. Filed September 30th, 1915. File No. 24,929.

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 646. 251

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,
Plaintiff in Error,

vs.

NORA GOTSCHALL, AS ADMINISTRATRIX OF THE ESTATE OF MERLIN E. GOTSCHALL, Deceased,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR UPON MOTION TO TRANSFER TO THE SUMMARY DOCKET FOR HEARING.

W. R. DUXBURY,
Attorney for Defendant in Error,
St. Paul, Minnesota.

LYLE PETTIJOHN,
St. Paul, Minnesota,
Of Counsel.

THE PIONEER COMPANY, ST. PAUL

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 646.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,
Plaintiff in Error,

vs.

NORA GOTSCHALL, AS ADMINISTRATRIX OF THE ESTATE OF MERLIN E. GOTSCHALL, Deceased,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR UPON MOTION TO TRANSFER TO THE SUMMARY DOCKET FOR HEARING.

STATEMENT OF FACTS.

Defendant in error recovered judgment against plantiff in error in the Supreme Court of the State of Minnesota on the 9th day of July, 1915. The cause is before this Court on a Writ of Error to the said Supreme Court, issued the 15th day of September, 1915.

Provided a saving of time or labor for this Court

will result therefrom defendant in error agrees that said cause may be and joins in the motion that it be transferred for hearing to the summary docket of this Court. If a transfer at this time will result in further delay defendant in error objects thereto upon the ground that the motion of plaintiff in error for such transfer is not made in good faith, fifteen months having been allowed to elapse between the time the writ of error was procured and the time the motion was made.

Defendant in error brought this action to recover damages for the death of her intestate. Deceased was 20 years of age July 8, 1912 and died August 10, 1912. At and for some time prior to his death he was in the employ of plaintiff in error. Extra freight 430, which was admittedly engaged in interstate commerce on August 9, 1912, left Jordan, Minnesota at about midnight in charge of the crew of which deceased was the head brakeman and started north towards Minneapolis, Minnesota.

The rear brakeman saw deceased ascending a ladder on the side of the train at a point more than half way back from the engine as the train was leaving Jordan, (R. f. 68). The engineer saw deceased's lantern signal from the ground as the train started, saw it again from on top and saw the light coming over the top towards the engine, (R. f. 14-17). About two miles out of Jordan on a reverse curve the train, which consisted of about fifty cars, pulled apart at a point near the middle, (R. f. 21 and 34). The cause of the separation was the unexpected opening of a coupler on a box car, the rear car attached to the front section after the break. When the train pulled apart, the air con-

nection was broken and the emergency brakes set automatically, bringing both sections of the parted train to the most sudden and violent stop it is possible to make, (R. f. 50). The train was running about twenty-five miles per hour when the break occurred, (R. f. 18).

After the break occurred, the front portion ran six or seven car lengths further than the rear portion, the engine pump counteracting to that extent the effect of the brakes (R. f. 54-55). The conductor, who had been riding upon the engine, went back to the point of the break to investigate and found the coupler on said box car open, (R. f. 50-51). The conductor was the only person who saw what conditions existed at the point of the break. He testified (R. f. 50-54), that the coupler which was uncoupled was a major knuckle and that *the only way in which this style of coupler can be operated is by pulling the lever with one hand and pulling the knuckle with the other hand.* Later on redirect examination he testified (R. f. 65-66) that HE DID NOT EXAMINE THE COUPLER ON THE CAR THAT WAS ATTACHED TO THE REAR END AT ALL. After coupling up, an attempt to proceed ahead caused a draw bar to be pulled out at a point nearer the engine than the first break (R. f. 24-25). About ten cars from the front end were then taken to Merriam Junction, the next station north, the engineer, fireman and conductor accompanying them and returning with the engine to the scene of the first break, (R. f. 27-28).

A search for the head brakeman by the engineer and conductor after returning from Merriam Junc-

tion resulted in his body being found across the rails cut in two, about seven car lengths back from where the first break occurred, and investigation disclosed that about seven cars had run over deceased, (R. f. 60). Deceased's proper place on the train when in motion was upon the engine. His duties required him to board the side of the train and walk over the top to reach the engine, as he was doing on this occasion (R. f. 48).

Deceased's father, 42 years of age is the sole beneficiary. Deceased had been living with, assisting and helping to support his father's aged mother, (R. f. 77). He was industrious and helped his parents in every way they needed help while living at home (R. f. 73). It is admitted (R. f. 10-11) that deceased's character and habits were good.

The jury returned a verdict in favor of defendant in error for $2,500.00, which the trial court reduced to $1,800.00.

ARGUMENT.

The case of Great Northern Ry. Co. vs. Wiles, 240 U. S. 444 was decided by this court without passing upon or considering the rule of *res ipsa loquitur*, upon which this case turns, further than saying:

> "The application of the doctrine to cases like that at bar is disputable. Patton v. Texas & Pacific Ry. Co., 179 U. S. 658; Looney v. Metropolitan Rd. Co., 200 U. S. 480, 486. We however, do not have to go farther than to indicate the dispute. The case at bar is not solved by the doctrine."

This court reversed the decision of the Supreme Court of the State of Minnesota in said Wiles case upon the ground that his own negligence was the proximate cause of the injury and death of Wiles, and did not review or pass upon the decision of said Minnesota Supreme Court as to the application of the rule of res ipsa loquitur in such cases.

The record does not contain the *first* opinion of the Minnesota Supreme Court in the case at bar. So far as it relates to the question of liability sought to be raised here it is, quoting from the *per curiam* decision reported at 125 Minn. 525, 147 N. W. 430:

> "The question whether the rule of res ipsa loquitur applies to the facts disclosed by the record is disposed of by the opinion in the case of Wiles v. Great Northern Ry. Co., 147 N. W. 427, filed herewith, which is followed and applied."

It being the decisive opinion written by the Minnesota Supreme Court, the Wiles decision should be embodied in the record herein in so far at least as this case is based upon the Wiles decision. Defendant therefor respectfully quotes the applicable portion of said Wiles decision and submits the same to this court for consideration as if contained in the printed record herein in order that this court may take into consideration the decision of the Minnesota Supreme Court on the particular issue of liability here sought to be questioned

(*Syllabus by the Court.*)

"1. MASTER AND SERVANT (Sec. 265*) —INJURY TO SERVANT—SAFE APPLI-

ANCES—DOCTRINE OF RES IPSA LOQUITUR.

The doctrine of res ipsa loquitur applies, the other conditions to its proper application obtaining, to the occurrence of an injury to an employe, when such injury is caused by the use of an appliance which it is the legal and nondelegable duty of the master to furnish and keep in a reasonably safe condition for use.

(Ed. Note.—For other cases, see Master and Servant, Cent. Dig., Sections 877-908, 955; Dec. Dig. Sec. 265*).

2. MASTER AND SERVANT (Sec. 265*)—INJURY TO BRAKEMAN—DOCTRINE OF RES IPSA LOQUITUR—APPLICATION.

The pulling out of a drawbar of a freight train affords a proper basis for the application of the doctrine of res ipsa loquitur.

* * * * * * *

The ultimate question is whether the evidence sustains the verdict. There are three included questions:

(1) Whether the doctrine of res ipsa loquitur applies to an employe situated as the deceased was.

(2) Whether the doctrine is applicable when the injury occurs through the pulling out of a drawbar on a freight train.

* * * * * * *

(2) 2. The next question is whether the pulling out of the drawbar affords a proper basis for the application of the doctrine of res ipsa loquitur. The limits of the doctrine are stated in 4 Wigmore, Sec. 2509, as follows:

'(1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construc-

tion, inspection or user. (2) Both inspection and user must have been at the time of the injury in the control of the party charged. (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured.'

This is substantially the doctrine stated in Jenkins v. St. Paul City Ry. Co., 105 Minn. 504, 117 N. W. 928, 20 L.R.A.(N.S.) 401, and in Olson v. Great Northern Ry. Co., 68 Minn. 155, 71 N. W. 5.

In Rose v. Minneapolis, Etc. Ry. Co., 121 Minn. 363, 141 N. W. 487, following the principle of the other cases, the doctrine was applied to the bursting of the air hose on a moving train. A number of applications are given in the notes to 4 Labatt on Master & Servant (2nd Ed.), Sec. 1601, 3 Bailey, Per. Inj. Sec. 797, and 4 Wigmore, Sec. 2509. Not all are consistent. The case of Looney v. Metropolitan R. Co., 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564, is without application. It illustrates the general rule that negligence cannot be inferred from an accident, and not the exceptional situation to which the doctrine of res ipsa loquitur applies.

It is urged by the defendant that the pulling out of a drawbar is not of such unusual occurrence that it furnishes a legitimate basis for the application of the doctrine. The instances of the pulling apart of drawbars are many; but compared with the constant use of so large a number of drawbars, a parting is unusual. Careless construction, inspection or user must usually account for the parting. In connection with the language already quoted, Dean Wigmore makes this observation:

'It may be added that the particular force and justice of the presumption, regarded as a

rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him, but inaccessible to the injured person.'

This expresses the good sense of the rule; and its application puts no unjust burden on a defendant who furnishes and has control of the instrumentality through which the injury comes, and who, from a practical standpoint, is the only one in possession of evidence which will explain the cause of the occurrence. The defendant in possession of the appliance and in charge of the operation of the train can, without undue hardship, ascertain its condition and preserve evidence of it. Unless the rule of res ipsa loquitur applies, the substantial result is that one, however innocently injured through the pulling out of a defective drawbar, or the representatives of one killed, cannot successfully maintain an action for the injury or death because of his inability to obtain evidence of the precise defect. The application of the doctrine is in aid of the fair administration of justice and is not unjust to the defendant.

The situation here involved renders applicable the doctrine of res ipsa loquitur and the jury were justified in finding negligence from the fact of the accident.

* * * * * * *"

Wiles v. G. N. Ry. Co., 125 Minn. 348, 147 N. W. 427.

Both the Patton and Looney cases, cited by plaintiff in error were decided long prior to the enactment of the Employers' Liability Laws and at a

time when the fellow servant defense was available. Since those laws went into effect common carriers are liable to employees engaged in interstate commerce:

> "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or *by reason of any defect or insufficiency,* due to its negligence, *in its cars,* engines, *appliances,* machinery, track, roadbed, works, boats, wharves, *or other equipment.* (Italics ours.)
>
> Employers' Liability Laws, approved April 22, 1908.

As to both the Patton and Looney cases we can do no better than again quote the Minnesota Supreme Court's words, supra, regarding the Looney case as follows:

> "The case of Looney v. Metropolitan R. Co., 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564, is without application. It illustrates the general rule that negligence cannot be inferred from an accident, and not the exceptional situation to which the doctrine of res ipsa loquitur applies."

The conductor's testimony (R. f. 53-54) that the knuckle on this open coupler could not be manipulated without pulling out on the lever with one hand and on the knuckle with the other hand shows that this coupler did not comply with the requirements of the Safety Appliance Acts in that it could not be uncoupled without the necessity of men going between the ends of the cars. *Plaintiff in error offered no testimony to show that this or any other coupler had been inspected either before or after the accident.* The conductor's testimony as

to the coupler stands undisputed. He discovered in the dark, at midnight, that this coupler would not open without pulling on the knuckle with the hand. Such a condition is a defect and insufficiency due to plaintiff in error's negligence especially so in view of the continuing absolute duty on its part to haul only cars equipped with couplers which will operate without the necessity of men going between the cars.

Couplers on railroad cars are instrumentalities peculiarly within the control of and as to which "the chief evidence of the true cause, whether culpable or innocent, is practically accessible to" the carrier and "inaccessible to the injured person," (Wigmore, supra). *Plaintiff in error in this case is the one "in possession of the appliance and in charge of the operation of the train" and could "without undue hardship, ascertain its condition and preserve evidence of it." It is the one "who, from a practical standpoint, is the only one in possession of evidence which will explain the cause of the occurrence,"* (Wiles decision, supra).

The physical facts disclosed by the testimony point to but one possible cause of death. The body was found about seven car lengths back from the point of the original break and about seven cars had run over him (R. f. 60). He was engaged in the proper discharge of his duties at the time (R. f. 48). The breaking open of the coupler is the only possible explanation of his fall and resulting death.

One is not required to prove the causal connection between the negligence and the injury by direct evidence. The evidence must be consistent

with plaintiff's theory of how the injuries occurred. If circumstantial evidence furnishes a reasonable basis for the inference by the jury of the ultimate fact that the alleged negligence was the cause of the injury complained of it is sufficient proof of the causal connection to support the verdict. Questions of issuable fact in all civil cases become questions for the court when *and only when* but one reasonable inference can be drawn from the evidence, in other words, when the evidence is conclusive one way or the other (in this case the only reasonable inference which can be drawn favors defendant in error and even as a question to be decided by the court necessarily supports the verdict rendered).

Rogers v. M. & St. L. Ry. Co., 99 Minn. 34, 108 N. W. 868;
Flack v. W. U. Tel. Co., 106 Minn. 337, 118 N. W. 1022.
Moores v. N. P. Ry. Co., 108 Minn. 100, 121 N. W. 392.

The Patton and Looney cases are practically in point with the same rules of law, both being to the effect that the evidence must *point to* the negligence complained of and indicating that where only one cause is inferrable from the evidence the jury is justified in finding that cause by their verdict.

The questions sought to be raised by plaintiff in error herein, come squarely within the rule stated in Chicago, etc. Ry. Co. v. King, 222 U. S. 222, 32 Sup. Ct. Rep. 79, as follows:

> "While the contentions, from an ultimate point of view, present a question of law—that

> is, was there any substantial evidence to go to the jury?—in their primary aspect they call for an examination of the entire evidence to determine whether it had any substantial tendency to establish the right of the plaintiff to recover. * * * we do not think we are called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusion of the courts below as to the tendencies of the proof. * * *"
>
> See also G. N. Ry. Co. v. Knapp, 36 Sup. Ct. Rep. 399, 240 U. S. 464.

Plaintiff in error assumes that it would be necessary for this court to review its former decisions in order to decide whether the doctrine of res ipsa loquitur is applicable here. The former decisions referred to, the Patton and Looney cases, did not so much as consider the application of that doctrine. This court has indicated on at least two occasions that the doctrine applies, provided the facts making its application proper exist. In Southern Ry. Co. v. Bennett, 233 U. S. 80-86, this court stated:

> "The phrase picked out fro criticism did not controvert that proposition but merely expressed in an untechnical way that if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden. The instruction is criticized further as if the judge had said *res ipsa loquitur*—which would have been right or wrong according to the res referred to. The judge did not say that the fall of the engine was enough, but that proof of a defect in appliances which the company was bound to use

> care to keep in order and which usually would be in order if due care was taken, was *prima facie* evidence of neglect,"

and in Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. Rep. 416, 418, this court said:

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."

The lower Federal courts have established the same rule, to wit; that the application of the doctrine of res ipsa loquitur depends upon, and is determined by the circumstances and that, the circumstances warranting, it applies as well in cases between employer and employe as in other relations.

> "* * * there is no hard and fast rule that the doctrine of res ipsa loquitur can in no case be applicable in a suit by an employe against an employer for negligent injuries. On the contrary, the rule referred to has been applied in numerous cases of that nature, the application of the rule being determined by the circumstances under which the accident is shown to have happened."

Byers v. Carnegie Steel Co., 159 Fed. 347, 86 C. C. A. 347, 16 L.R.A. (N.S.) 214.

See also,

Lucid v. Du Pont Powder Co., 199 Fed. 377, 118m C. C. A. 61.

The wording in the Bennett case, supra: *"which would have been right or wrong, according to the res referred to"* shows that the position this court has taken in the matter is that the doctrine is properly applied when the res referred to is the defective instrumentality, and improperly when the res referred to is the happening of the accident alone.

The record does not indicate nor has plaintiff in error made any argument tending to show that any negligence on the part of deceased contributed to his death.

SECOND.

No part of the trial court's charge to the jury is assigned as error here. As to the measure of damages the court charged, (R. f. 85):

> "Now, the plaintiff, if entitled to recover at all, is entitled to recover the pecuniary loss which the father suffered by reason of the death of the son. Nothing can be recovered for wounded feelings or loss of society or anything of that sort, it is a mere matter of pecuniary loss, and it is based upon the reasonable expectation of pecuniary benefit from the continuance of the life of the son, that is, what reasonable expectation, so far as pecuniary benefit is concerned, what would reasonably be expected in that regard for the father if

> the life of the son had been continued. This is a matter, of course, of estimation largely. It is impossible to fix it with definite certainty, but it is proper to take into consideration, of course, the age of the son, his habits of industry or otherwise, his earning capacity at the time, the relation between himself and his father, and in view of the situation and circumstances to say, in the exercise of a wise judgment, what the father has been deprived of in a pecuniary way, if anything, by the death of the son at this time."

In Mich. Cent. R. Co. v. Vreeland, 227 U. S. 59, the judgment of the lower court was reversed *"for this error"* in the charge and nothing else:

> "measure, as far as you can, what it would reasonably have been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, *the care and advice* of Mr. Wisemiller, her husband." (Italics ours.)

In Am. R. Co. v. Didrickson, 227 U. S. 145, the judgment of the lower court was reversed on *this single* error in charging the jury:

> "take into consideration the fact that they are the father and mother of deceased, and the fact *that they are deprived of his society and the care and consideration he might* take of them or have for them during his life." (Italics ours.)

St. L. I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, holds that the Employers' Liability Laws (Act of Congress, April 22, 1908) supersede state laws in the matters with which they deal and states that

"in the case of death, the only action is one for the benefit of the next of kin."

St. L. S. F. & Tex. R. Co. v. Seale, 229 U. S. 156, holds that the Employers' Liability Laws, supra, supersede the state law and that the proper party to institute an action for damages for death is deceased's personal representative.

Gulf C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, holds that the statutory action of an administrator is not for the equal benefit of the surviving relatives for whose benefit the suit is brought, but that the interest of each beneficiary must be measured by his individual pecuniary loss.

The Didrickson case, supra, is the only one cited by plaintiff in error in which the relationship between deceased and the beneficiaries was the same as it is here. The portion of the opinion in that case wherein the correct measure of damages is stated is:

> "The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe. The damage is limited strictly to the financial loss sustained."

Practically the same rule for measuring damages has been announced by this court in every opinion rendered involving that question. The charge in the case at bar is almost a verbatim statement of that rule and contains the statement "*Nothing can be recovered for wounded feelings or loss of society or anything of that sort*," thereby *affirmatively eliminating* from the jury's consider-

ation those features which were declared to be improper in the Didrickson case.

In the case at bar the father is the sole beneficiary. He is the only person whose pecuniary loss was submitted to the jury. The action is prosecuted by the personal representative. The authorities cited in the brief of plaintiff in error are neither in point nor decisive in this case.

Garrett v. L. & N. R. Co., 35 Sup. Ct. Rep. 32, is not cited by plaintiff in error although it was used at the oral argument in the court below. That case is different from the one at bar in many ways. Nothing was before this court for review in the Garrett case excepting a question as to the sufficiency of the pleadings. The case was tried in one of the U. S. Circuit Courts and the declaration was held insufficient by that court and by the Circuit Court of Appeals. The deceased was an adult son.

In the present case a final judgment *upon the merits* is before this court. The case was twice tried in the District Court of the State of Minnesota and twice appealed to and argued before the Supreme Court of the State of Minnesota. The sufficiency of the pleadings and proof has been affirmed four times by the State Courts of Minnesota.

The deceased here was only twenty years old, a minor. In Minnesota, where deceased was employed, the parent is entitled to the earnings of minor children, the only prerequisite to the taking of same being notice to the employer that he, the parent, claimed the earnings (Revised Laws of Minnesota for the Year 1905, Section 1812). Furthermore, such earnings are exempt to the parent

from everything excepting a liability contracted for the special benefit of the minor (R. L. 1905, supra, sec. 4317, subdiv. 17).

The sole beneficiary herein, the father was only forty-two years old, a locomotive engineer himself. In the Vreeland case, supra, it is stated

> "The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. *That is not the sole test.* There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived."

Here there was an enforceable legal liability from the son, the wages during minority, of which the father was deprived. The fact that the father's health and circumstances had been such in the past that he had not asked for or required contributions from the son does not not tend to prove that such health and circumstances would continue. Assistance rendered by the deceased to the father's aged mother may have had some influence over the father's actions regarding contributions to him personally. If the failure to appropriate the minor's wages or to request or require contributions is sufficient to absolutely negative a reasonable expectation of pecuniary benefits as a matter of law the father is punished for treating the son in a decent and respectable manner.

The jury was satisfied by the showing made of the son's habits, character, earning capacity, and all the circumstances that the father had been deprived of "a reasonable expectation of pecuniary benefits" which, under the Vreeland and Dickrickson cases, supra, and many others decided by this

court, is such damages as will sustain a verdict based thereon.

The writ of error herein was procured by plaintiff in error on the 15th day of September, 1915, the record was transmitted to this court by the Supreme Court of the State of Minnesota on the 20th of September, 1915, and was filed in this court on the 30th of September, 1915. The motion to transfer to the summary calendar was not made until December 23, 1916.

The writ of error herein was taken for delay only and the questions sought to be raised are so frivolous as not to need further argument.

It is therefore respectfully submitted that the judgment of the Supreme Court of the State of Minnesota should be affirmed with costs and ten per cent damages in addition to interest.

W. R. DUXBURY,
Attorney for Defendant in Error,
St. Paul, Minnesota.

LYLE PETTIJOHN,
St. Paul, Minnesota,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. [redacted] 251

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,
Plaintiff in Error,

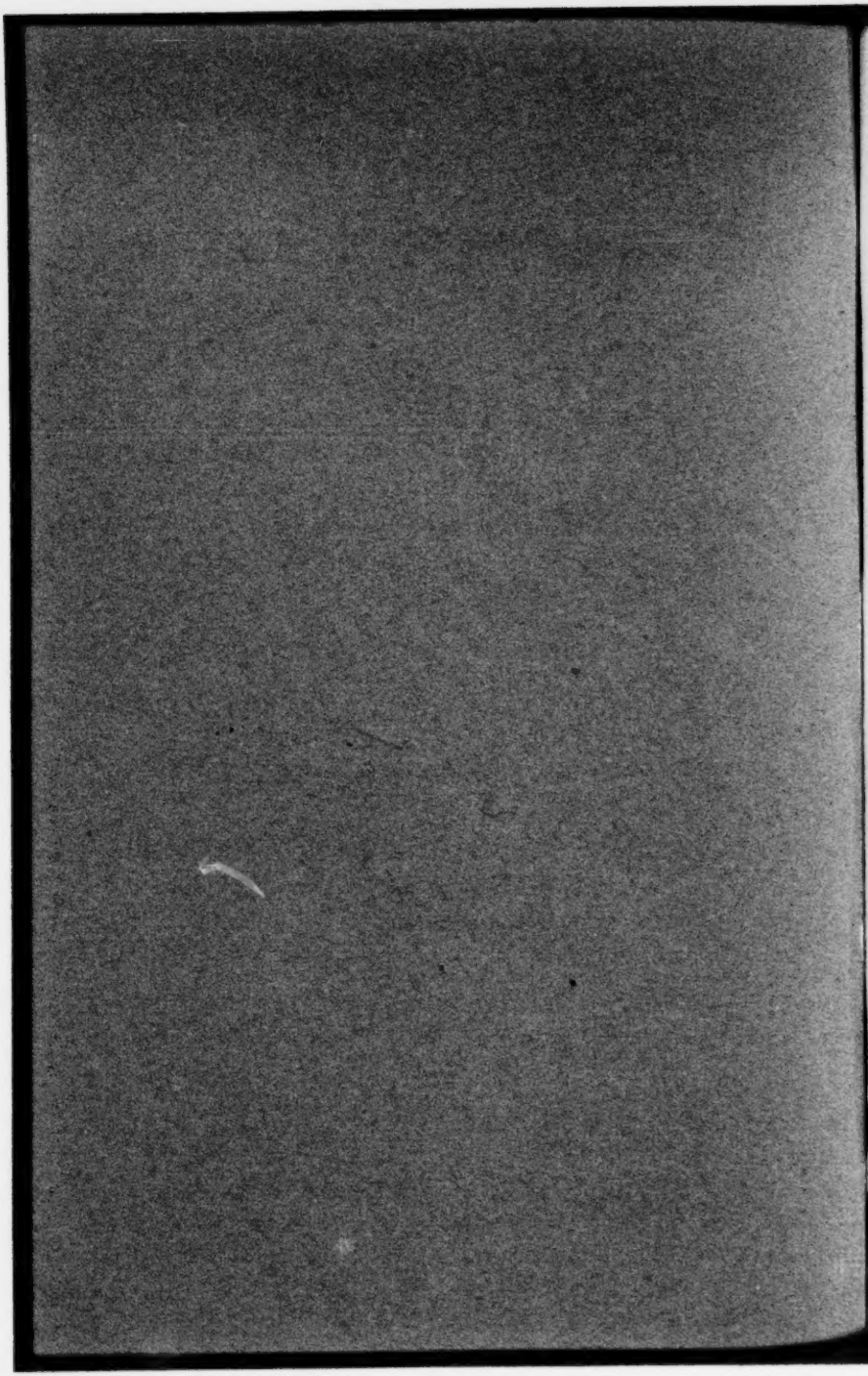
vs.

NORA GOTSCHALL, AS ADMINISTRATRIX OF THE ESTATE OF MERLAN E. GOTSCHALL, DECEASED,
Defendant in Error.

Motion for an Order Transferring the Cause to Summary Docket and Brief in Support thereof.

WILLIAM H. BREMNER,
FREDERICK M. MINER,
Attorneys for Plaintiff in Error,
Minneapolis, Minnesota.

Review Publishing Company, 225 So. 3rd St., Minneapolis



Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 646.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,
Plaintiff in Error,

vs.

NORA GOTSCHALL, AS ADMINISTRATRIX OF THE ESTATE OF MERLAN E. GOTSCHALL, DECEASED,
Defendant in Error.

MOTION FOR AN ORDER TRANSFERRING THE CAUSE TO SUMMARY DOCKET.

Comes now the above named The Minneapolis & St. Louis Railroad Company, plaintiff in error, and moves the court to transfer said cause to the summary docket and for cause and ground for this motion to so transfer says:

The action is one founded upon the Federal Employers' Liability Act and pursuant to the custom of this court and for a saving of time to the court, and because the questions involved should be summarily disposed of, in accordance with the method adopted by this court for disposing of such issues this plaintiff in error believes that said cause properly belongs on, and should be transferred to said summary docket.

And mover will ever pray.

WILLIAM H. BREMNER,
FREDERICK M. MINER,
Attorneys for Plaintiff in Error,
Minneapolis, Minn.

(Title of Cause.)

NOTICE OF MOTION.

Please to take notice that the foregoing and attached Motion will be presented to the said the Honorable Supreme Court of the United States at its court room in the Capitol Building in the City of Washington, D. C. on Monday the 8th day of January, A. D. 1917.

WILLIAM H. BREMNER,
FREDERICK M. MINER,
Attorneys for Plaintiff in Error,
Minneapolis, Minn.

To W. R. Duxbury, attorney for above named defendant in error, St. Paul, Minn.

Due personal service is hereby admitted at St. Paul, Minn., on the 23rd day of December, A. D. 1916, of the foregoing Notice of Motion and of the said Motion and Brief thereto attached.

W. R. DUXBURY,
Attorney for Defendant in Error,
St. Paul, Minn.

(Title of Cause.)

In support of plaintiff in errors motion that this case be transferred to the summary docket we present the following Statement of Facts and Points and Authorities.

FACTS.

For convenience the parties will be spoken of herein as they were arranged in the district or trial court. The plaintiff declaring upon the Federal Employers Liability Act, alleged that her intestate Merlin E. Gotschall as an employe of the defendant railroad suffered injuries on the 9th day of August, 1912, which resulted in his death; that such injuries were caused by the negligence of the defendant, which grounds of negligence were stated to be "carelessness, recklessness and negligence" of the defendant in failing to properly maintain its tracks and roadbed at the point designated and in permitting and allowing a sag or depression in the roadbed at a sharp curve in said line of railway, and by reason of the careless, reckless and negligent act of the defendant in permitting to be hauled in said train a certain box car when the coupling apparatus upon said car was out of repair, defective and old, and the knuckles of which were worn, making it liable to come uncoupled, and also by reason of its defective and dangerous condition in that the coupling on said car was out of alignment with said coupling device attached to the car to which the car in question was coupled, and by reason of the careless, negligent and defective condition of the roadbed of defendant Railroad Company at said point, and by reason of the careless, negligent and defective condition of said coupler and said coupling device, and by reason of the careless, negligent and high rate of speed at which said train was being operated over said defective tracks, all caused this train to come apart, causing the parts of said train to come to an immediate stop with a violent and sudden jerk, while intestate was engaged in his duties on the

top of said train, and which resulted in throwing him from the top of said train, thereby causing him to fall upon the track and between the cars in said train resulting in his death.

That said deceased left surviving him his father, Everett J. Gotshall, of the age of 42 years, and his grandmother, the plaintiff, Nora Gotschall, of the age of 65 years, with whom the decedent was living and to whom he was making contributions for support for and on whose behalf the action was brought (R., ff. 3, 4, 5 and 6).

The defendant answered by way of a general denial and pleaded that the cause of the death of plaintiff's intestate was either unavoidable accident or the failure on the part of intestate to exercise for his own safety reasonable and ordinary care (R., ff. 6-7).

The facts were not in dispute.

On the 10th day of August, 1912, plaintiff's intestate, a young man 20 years of age was in the employ of the defendant as a freight brakeman, and on the day in question was a member of a crew operating an interstate freight train for the defendant from Albert Lea to Minneapolis (R., ff. 10-12).

At a point about two miles north of Jordan, an intermediate station between Albert Lea and Minneapolis the train separated (R., f 49). The train consisted of 45 or 50 cars, loads and empties (R., f. 50). The conductor of the train who was riding upon the engine at the time, went back to ascertain what had occurred and he found that a knuckle on the rear end of the car most remote from the engine, where the break occurred, had opened sufficiently to allow a separation of the train into two parts (R., f. 51). This coupler and the one on the car to the south, that is, the

north car of the rear part of the train after the separation, were brand new couplers and the conductor the only man who examined them at the time could not tell what caused the separation (R., f. 52). The front part of the train was backed up to the rear portion from which it had separated, when the two couplers coupled automatically without any trouble, and no further difficulty was experienced at that point (R., ff. 53-54). As to condition of couplers see also cross examination record folios 62-63.

The intestates sole beneficiary, under the Federal Act was his father, Everett J. Gotschall, who had one child besides the deceased, a daughter who at the time of the trial was married and living at Shawnee, Okla. At no time previous to his death did the deceased contribute any money towards the support of his father or mother, and the father had never called upon the deceased to give him any of his earnings, and the father did not know whether deceased had ever contributed any money to his mother or sister (R., ff. 71-75).

At the close of all the testimony the defendant moved the court to direct a verdict in its behalf, for the reason that the evidence failed to establish any negligence on the part of the defendant, and that under the circumstances disclosed by the testimony the rule of *res ipsa loquitur* did not apply; that the testimony of the plaintiff showed conclusively that the particular contrivances where the train separated were not defective, that the couplers were automatic, were new, all the parts were complete and in working order and coupled up automatically when the train backed up, and upon the further ground that no testimony had been introduced by plaintiff to afford the basis for a recovery of damages, no contribution of any kind having

been shown and no testimony being introduced which could afford the basis for a finding as of fact that had the deceased lived he might or would have contributed to the only person shown to be entitled to an expectancy i. e. his father (R., f. 79).

Which motion was denied. The court thereupon instructed the jury that the fact that the train separated in the absence of an explanation as to what caused it, might raise a reasonable inference which the jury would be at liberty to draw that the coupler was defective, and that it was in that condition because of a want of care upon the part of the defendant (R., f. 82).

The jury found against the defendant and in favor of the plaintiff as administratrix. Judgment was entered upon the verdict (which was reduced by the trial court from $2,500.00 to $1,800.00) which judgment upon appeal to the Supreme Court of Minnesota was affirmed (R., ff. 88 to 105 in sequence). Thereupon and on the 10th day of September, 1915, a writ of error to the Supreme Court of Minnesota was granted by Mr. Justice Day of this court and the cause was thereby brought here for final review.

POINTS AND AUTHORITIES.

The Supreme Court of Minnesota erred in adjudging and decreeing that the rule of *res ipsa loquitur* applied to the facts disclosed by the testimony in this case. Such rule between master and servant is not applicable under the law as construed by this court.

Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658.

Looney v. Met. R. R. Co., 200 *id.* 480.

Great Northern Ry. Co. v. Wiles, 240 U. S. 444.

That the Supreme Court of Minnesota erred in holding, adjudging and decreeing that the testimony offered upon the trial was sufficient to warrant the jury in finding as a fact that had the deceased survived he would probably have contributed to his father the sum found by the verdict, or any other sum, and that the complaint was sufficient to tender such issue for trial, and that by so holding, adjudging and decreeing the Supreme Court of Minnesota deprived this appellant of a right guaranteed to it by that Act of Congress passed June 22, 1908, 35 Statutes at Large, 765, Chapter 65, commonly known as the Federal Employers' Liability Act.

Mich. Cent. R. R. Co. v. Vreeland, 227 U. S. 59.
American R. R. Co. v. Didricksen, 227 *id.* 145.
St. L. I. M. & S. Ry. Co. v. Hesterly, 228 *id.* 702.
St. L. S. F. & Tex. R. Co. v. Seale, 229 *id.* 156.
Gulf C. & S. F. Ry. Co. v. McGinnis, 228 *id.* 173.

ARGUMENT.

An examination of the plaintiff's complaint shows four grounds of negligence were alleged against the defendant Railroad Company:

1. A defective track;
2. An old worn and defective coupler;
3. Couplers out of alignment;
4. An excessive rate of speed.

Upon the trial of the cause plaintiff failed to offer testimony tending to prove any of the alleged grounds of negligence, but at the close of the trial claimed a right to recover solely upon the fact of the separation of the train into two parts. It was the contention of the plaintiff,

which was sustained by the Supreme Court of Minnesota, that the mere fact of the separation justified the jury in finding that the defendant was guilty of negligence, in other words, the trial court and the Supreme Court of the State, expressly held that under the facts shown in evidence (the facts being without dispute) the rule of *res ipsa loquitur* was applicable. The Minnesota court based its decision upon the case of *Wiles v. Great Northern Railway Company*, which it had recently theretofore decided, and which case upon writ of error was reversed by this court without passing upon the question as to whether or not the particular point as to the application of the rule as declared by the Minnesota court was or was not correct.

At the time of taking the writ of error in this cause we had supposed that the question as to the applicability of the rule so far as the Federal Courts are concerned, had been placed at rest by the former decisions of this court in the *Patton* and *Looney cases*, *supra*, but after this writ was taken this court decided the *Wiles case*, *supra*, and said:

> "The Supreme Court applied the rule of *res ipsa loquitur* and justified the submission to the jury of the negligence of the Railway Company as a deduction from the pulling out of the drawbar and the proportion of its casual relation to the death of Wilds, to the amount of negligence attributable to him, and reversed the action of the trial court entering judgment for the company notwithstanding the verdict. The application of the doctrine to cases like that at bar is disputable (citing the *Patton* and *Looney cases*). We, however, do not have to go farther than to indicate the dispute. The case at bar is not solved by the doctrine."

We are unable to determine from this language whether this court intended to imply a doubt as to the soundness of the principle applied by it in the *Patton* and *Looney cases*, or whether we are to infer that such cases may still be regarded as applying the correct principle for the courts of the Nation and for state courts in disposing of causes therein founded upon the Federal Act.

There is some language in the opinion in the *Looney case* which seems to us to be persuasive in the decision of this question as presented upon the record. In the course of the opinion in that case Mr. Justice McKenna stated this rule as being applicable:

> "A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

In this case as we understand it the burden of proof was upon the plaintiff to establish by a fair preponderance of the evidence negligence on the part of defendant. We fail to see how that burden can be said to have been fairly met by a simple showing that the train separated in view of the fact that the uncontradicted testimony discloses that the two couplers on the ends of the two cars where the separation occurred were new appliances, in good condition, and that the only witness who had knowledge and testified as to the fact stated that after an examination of the coupler where the knuckle opened sufficiently to allow the separation, he was unable to find anything in the condition of the contrivance which would account for the separation; that it appeared to be a perfect contrivance and that when he caused the two parts of the train to come together the two couplers coupled automatically and there was no further difficulty with them.

Whether or not the court intends to review its former decisions upon this subject and further consider as to whether the rules should apply or not in cases of this character, of course we do not know. If it is the purpose of the court to re-examine the subject we know of no way by which we can afford any aid further than by the citations of the cases wherein it has been already determined that the rule under the circumstances herein disclosed, if we understand the decisions correctly, does not apply, and we content ourselves with the citation of such cases.

The second contention is that no proper issue was tendered and no competent proof offered to show that had deceased lived he would, or might, have contributed any sum whatever to his sole beneficiary, his father, or that, stating it another way, the father had sustained any pecuniary loss as a result of the deplorable accident resulting in the death of his son.

We submit that this contention is justified from a consideration of the cases cited, *supra*, wherein this court has been called upon to consider the question of recoveries in behalf of beneficiaries in actions founded upon the Federal Employers' Liability Act, and particularly upon what is said by the court in the McGinnis case. In the course of the opinion in that case Mr. Justice Lurton goes fully into the subject and among other things stated:

> "In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employe for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss (citing cases)."

The court then quotes from the *Didricksen case,* as follows:

> "The cause of action which was created in behalf of the injured employe did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employe from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe. The damage is limited strictly to the financial loss thus sustained."

It will appear from an examination of the plaintiff's complaint that it contained no allegation that the father had suffered any pecuniary loss, the allegation being as follows:

> "That the said Merlin E. Gotschall deceased left surviving him his father, Everett J. Gotschall, who is of the age of 42 years, and his grandmother, the plaintiff herein, Nora Gotschall, who is of the age of about 65 years, and with whom the decedent was living, and to whom he was making contribution for support, for and on whose behalf this action is brought" (R., f. 5).

The only testimony with reference to contribution upon the record will be found, beginning in folio 73, with the question propounded to his father:

> "Q. How about his having been industrious?
>
> A. Well, he had always been industrious; always had something to do.
>
> Q. While he was going to High School did he do any work?
>
> A. Well, he did odd jobs, yes.
>
> Q. Earn any money during those times?
>
> A. He earned a little.
>
> Q. At any time previous to his demise did he contribute to the support of yourself or your wife?
>
> A. No.
>
> * * * * * * * * *

Q. You never had called upon him to give you any money, had you?

A. No, sir.

Q. Never had asked him to give you any of his earnings?

A. No, sir.

Q. Did you know whether or not he had given any money to any other member of the family?

Mr. Miner: Wait a minute. What do you mean by that?

Mr. Petitjohn: Sister.

Mr. Miner: His sister or mother, I don't object to that.

A. I don't know."

It is respectfully submitted that the foregoing sufficiently shows the entire absence of any testimony from which the jury could properly find that anyone had sustained a financial loss as a result of the young man's untimely demise.

For the reasons stated, and upon the authorities submitted, we respectfully submit that the result reached in this case was erroneous and that the judgment of the Supreme Court of the State of Minnesota should be reversed, all of which is respectfully submitted.

WILLIAM H. BREMNER,
FREDERICK M. MINER,
Attorneys for Plaintiff in Error.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY *v.* GOTSCHALL, ADMINISTRATRIX OF GOTSCHALL.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 251. Argued April 9, 1917.—Decided May 21, 1917.

Plaintiff's intestate, a brakeman, was thrown from a train carrying interstate commerce, and killed, as a result of couplers coming open while the train was in motion. *Held*, that, in view of the Safety Appliance Act, negligence might be inferred from the mere opening of the couplers.

A father who by the state law is entitled to the earnings of his son during minority may recover damages for the latter's death upon a cause of action under the Federal Employers' Liability Act.

130 Minnesota, 33, affirmed.

THE case is stated in the opinion.

Mr. William H. Bremner and *Mr. Frederick M. Miner* for plaintiff in error, submitted.

Mr. Lyle Pettijohn, with whom *Mr. W. R. Duxbury* was on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Basing her cause of action upon the Federal Employers' Liability Act, the defendant in error as administratrix of the estate of Merlin E. Gotschall, deceased, sued to recover from the Railroad Company, plaintiff in error, damages resulting from his death alleged to have been occasioned by the negligence of the company while he was in its employ engaged in interstate commerce. On this writ of

error a reversal is sought of the action of the court below in affirming a judgment entered by the trial court on the verdict of a jury in favor of the plaintiff.

The evidence tended to show the following facts: Gotschall, a minor twenty years old, at the time in question was head brakeman on an extra freight train running from Albert Lea, Minnesota, to Minneapolis and transporting interstate commerce merchandise. As the train left Jordan, an intermediate station, Gotschall boarded a car toward the rear end and was proceeding along the tops of the cars toward the locomotive when the train separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes and a sudden jerk which threw Gotschall off the train and under the wheels.

The jury, under an instruction of the court, was permitted to infer negligence on the part of the company from the fact that the coupler failed to perform its function, there being no other proof of negligence. It is insisted this was error, since as there was no other evidence of negligence on the part of the company the instruction of the court was erroneous as from whatever point of view looked at it was but an application of the principle designated as *res ipsa loquitur*, a doctrine the unsoundness of which, it is said, plainly results from the decisions in *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658 and *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480. We think the contention is without merit because, conceding in the fullest measure the correctness of the ruling announced in the cases relied upon to the effect that negligence may not be inferred from the mere happening of an accident except under the most exceptional circumstances, we are of opinion such principle is here not controlling in view of the positive duty imposed by the statute upon the railroad to furnish safe appliances for the coupling of cars. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210

U. S. 281, 294, 295; *Chicago, Burlington & Quincy Ry. Co.* v. *United States*, 220 U. S. 559, 575; *Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S. 580, 586; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 43.

Again it is insisted that error was committed in submitting the case to the jury because there was no evidence of pecuniary loss resulting to Gotschall's father, on whose behalf the suit was brought. But this disregards the undisputed fact that the deceased was a minor and, as under the Minnesota law the father was entitled to the earnings of his son during minority, the question is one not of right to recover, but only of the amount of damages which it was proper to award.

Affirmed.